Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Customs and Patent Appeals and the United States Court of International Trade

Vol. 15 AUGUST 17, 1981 No. 33

This issue contains

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 81–206)

Bonds

Approval and discontinuance of carrier's bonds, Customs Form 3587

Bonds of carriers for the transportation of bonded merchandise have been approved or discontinued as shown below. The symbol "D" indicates that the bond previously outstanding has been discontinued on the month, day, and year represented by the figures which follow. "PB" refers to a previous bond, dated as represented by figures in parentheses immediately following, which has been discontinued. If the previous bond was in the name of a different company or if the surety was different, the information is shown in a footnote at the end of the list.

Dated: July 30, 1981.

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
A.T.F. Trucking Co., Inc., Rt. 11, Box 507–B, Birmingham, AL; motor carrier; Ins. Co. of North America.	May 29, 1981	June 17, 1981	Mobile, AL $25,000
Ace Air Cargo Express, Inc., d.b.a. Ace Cargo Service, 6410 Eastland Rd., Suite F, Brookpark, OH; air carrier; St. Paul Fire & Marine Ins. Co. D 6/17/81.	Jan. 14, 1981	Jan. 19, 1981	Cleveland, OH $50,000
Arkansas Best Freight Systems, Inc., 1000 S. 21st St., Fort Smith, AR; motor carrier; Fidelity & Deposit Co. of MD. (PB 9/15/70) D 6/10/81 [1]	June 10, 1981	June 10, 1981	New Orleans, LA $25,000
Associated Truck Lines, Inc., One Vanderberg Center, Grand Rapids, MI; motor carrier; Safeco Ins. Co. of America. (PB 7/27/75) D 6/13/81 [2]	June 4, 1981	June 13, 1981	Detroit, MI $50,000
Auto Driveaway Co., 310 S. Michigan Ave., Chicago, IL; motor carrier; Transamerica Ins. Co.	June 30, 1981	July 7, 1981	Chicago, IL $25,000
Baltimore-Washington Express Service, Inc., 3605 Benson Ave., Baltimore, MD; motor carrier; The American Ins. Co. D 8/10/81	July 24, 1979	Sept. 5, 1979	Baltimore, MD $25,000

See footnotes at end of table.

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
Hugh Michael Clark, d.b.a. Clark Transportation, 1547 Lori Ave., Sarnia, ON Canada; motor carrier; The Travelers Indemnity Co.	May 6, 1981	July 13, 1981	Laredo, TX $25,000
General Highway Express, Inc., 2280 Industrial Dr., P.O. Box 727, Sidney, OH; motor carrier; Fireman's Fund Ins. Co. (PB 1/28/70) D 6/23/81	June 9, 1981	June 23, 1981	Cleveland, OH $50,000
Interstate Contract Carrier Corp., 2100 W. 2200 S., Salt Lake City, UT; motor carrier; St. Paul Fire & Marine Ins. Co.	Sept. 5, 1980	June 11, 1981	Los Angeles, CA $50,000
Larry Johnson, d.b.a. Larry Johnson Aircraft, P.O. Box 1389, McAllen, TX; air carrier; Fidelity & Deposit Co. of MD. D 6/15/81	June 11, 1979	July 24, 1979	Laredo, TX $25,000
Liquid Transporters, Inc., 1292 Fern Valley Rd., P.O.B. 36247, Louisville, KY; motor carrier; Insurance Co. of North America. (PB 6/21/71) D 7/7/81	June 21, 1981	July 7, 1981	Cleveland, OH $150,000
Marine Transport Co., P.O. Box 2142, Wilmington, NC; motor carrier; Washington International Ins. Co.	June 1, 1981	June 1, 1981	Wilmington, NC $25,000
Nebraska Bulk Transports, Inc., P.O. Box 215, Bennet, NB; motor carrier; Aetna Casualty & Surety Co.	May 1, 1981	June 26, 1981	Chicago, IL $25,000
Ohio Container Service, Inc., 2701 Lakeside Ave., Cleveland, OH; motor carrier; St. Paul Fire & Marine Ins. Co. (PB 4/11/79) D 6/17/81 [3]	May 1, 1981	June 17, 1981	Cleveland, OH $100,000
Ozark Air Lines, Inc., Lambert-St. Louis International Airport, St. Louis, MO; air carrier; North River Ins. Co. (PB 2/4/80) D 6/1/81 [4]	June 1, 1981	June 1, 1981	St. Louis, MO $25,000
Redwing Carriers, Inc., 8515 Palm River Rd., Tampa, FL.; motor carrier; Ins. Co. of North America. D 7/2/81	June 1, 1973	June 1, 1973	Tampa, FL $25,000
Sherwood Hume Transportation Ltd., 141 Healey Rd., P.O. Box 644, Bolton, Ontario, Canada; motor carrier; Hartford Fire Ins. Co.	Oct. 8, 1980	June 8, 1981	Buffalo, NY $25,000
Wallace Colville Motor Freight Inc., N. 404 Sycamore, Spokane, WA; motor carrier; Safeco Ins. Co. of America. (PB 8/1/72) D 6/8/81 [5]	Sept. 23, 1980	June 8, 1981	Seattle, WA $25,000
West Coast Warehouse Corp., P.O. Box 258, Long Beach, CA; motor carrier; St. Paul Fire & Marine Ins. Co. (PB 11/15/76) D 5/28/81 [6]	May 8, 1981	May 29, 1981	Los Angeles, CA $50,000
West Shore Transport Co., Inc., P.O. Box 765, Hammond, IN; motor carrier; The North River Ins. Co. D 5/22/81.	Nov. 6, 1978	Nov. 6, 1978	Milwaukee, WI $25,000

See footnotes at end of table.

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
William J. Call, d.b.a. Wisconsin Cartage Co., 1121 W. Grange Ave., Milwaukee, WI; motor carrier; The Ohio Casualty Ins. Co.	Apr. 6, 1981	May 22, 1981	Milwaukee, WI $25,000

[1] Surety is Fireman's Fund Ins. Co.
[2] Surety is Protective Ins. Co.
[3] Surety is Washington International Ins. Co.
[4] Surety is Safeco Ins. Co. of America.
[5] Surety is Royal Indemnity Co.
[6] Surety is Fireman's Fund Ins. Co.

BON-3-03

MARILYN G. MORRISON,
Director,
Carriers, Drawback and Bonds Division.

(81-207)

Reimbursable Services—Excess Cost of Preclearance Operations

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., August 3, 1981.

Notice is hereby given that pursuant to section 24.18(d), Customs Regulations (19 CFR 24.18(d)), the biweekly reimbursable excess costs for each preclearance installation are determined to be as set forth below and will be effective with the pay period beginning August 23, 1981.

Installation:	*Biweekly excess cost*
Montreal, Canada	$17,717
Toronto, Canada	31,795
Kindley Field, Bermuda	6,747
Nassau, Bahama Islands	17,244
Vancouver, Canada	12,139
Winnipeg, Canada	2,113
Freeport, Bahama Islands	13,323
Calgary, Canada	10,027
Edmonton, Canada	4,756

JACK T. LACEY,
Comptroller.

Published in the Federal Register August 7, 1981 (46 FR 40362)

(T.D. 81-208)

Foreign Currencies—Daily Rates For Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 USC 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Argentina peso:	
July 20–23, 1981	$0.000214
July 24, 1981	.000211
Chile peso:	
July 20–24, 1981	$0.025667
Colombia peso:	
July 20–24, 1981	$0.018403
Greece drachma:	
July 20, 1981	$0.167736
July 21, 1981	.016611
July 22, 1981	.016667
July 23, 1981	.016750
July 24, 1981	.016736
Indonesia rupiah:	
July 20–24, 1981	$0.001585
Israel shekel:	
July 20–24, 1981	$0.082645
Peru sol:	
July 20–23, 1981	$0.002370
July 24, 1981	.002342
South Korea won:	
July 20–24, 1981	$0.001456

(LIQ-03-01 O:C:E)

Date: July 24, 1981.

KENNETH A. RICH,
Acting Chief,
Customs Information Exchange.

(T.D. 81-209)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to Section 522(C), Tariff Act of 1930, as amended (31 USC 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

South Africa rand:	
July 20–23, 1981	Quarterly
July 24, 1981	$1.0617
Thailand baht (tical):	
July 20–24, 1981	$0.043384

(LIQ-03-01 O:C:E)

Date: July 24, 1981.

KENNETH A. RICH,
Acting Chief,
Customs Information Exchange.

(T.D. 81-210)

Bonds

Approval and discontinuance of bonds on Customs Form 7587 for the control of instruments of international traffic of a kind specified in section 10.41a of the Customs Regulations.

Bonds on Customs Form 7587 for the control of instruments of international traffic of a kind specified in section 10.41a of the Customs Regulations have been approved or discontinued as shown below. The symbol "D" indicates that the bond previously outstanding has been discontinued on the month, day, and year represented by the figures which follow. "PB" refers to a previous bond, dated as represented by the figures in parentheses immediately following which has been discontinued. If the previous bond was in the name of a different

company or if the surety was different, the information is shown in a footnote at the end of the list.

Dated: August 4, 1981.

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
Aerospatiale Helicopter Corp., 2701 Forum Drive, Grand Prairie, TX; Washington International Ins. Co.	May 7, 1981	May 14, 1981	New York Seaport $10,000
Allied Intercontinental Agency, Inc., 39 Broadway, New York, NY; Investors Ins. Co. of America. (PB 2/26/79) D 2/26/81. [1]	Feb. 26, 1981	Feb. 26, 1981	New York Seaport $10,000
American Oceanic Shipping Corp., 50 Broad St., New York, NY; Washington International Ins. Co.	May 21, 1981	May 22, 1981	New York Seaport $10,000
Boke Trading, Inc. (a PA corp.), 900 Two Allegany Center, Pittsburgh, PA; Investors Ins. Co. of America.	May 12, 1981	May 12, 1981	Wilmington, NC $10,000
China Ocean Shipping Co., 200 Carondelet St., New Orleans, LA; Washington International Ins. Co.	July 8, 1981	July 10, 1981	New Orleans, LA $10,000
Clou Containers Inc. and its wholly owned sub: compass Container Inc., 17 Battery Place, New York, NY; Washington International Ins. Co. (PB 3/17/80) D 6/19/81 [2]	June 15, 1981	June 19, 1981	New York Seaport $10,000
Consafe, Inc., P.O. Box 40339, Houston, TX; Old Republic Ins. Co.	Apr. 27, 1981	Apr. 27, 1981	New Orleans, LA $10,000
Container-Lloyd (USA) Inc., and/or Container-Lloyd Leasing Div. of Container-Lloyd (USA) Inc., 140 S. Dearborn St., Chicago, IL; Insurance Co. of North America. D 1/27/81	Jan. 21, 1977	Jan. 21, 1977	Chicago, IL $10,000
Dalton Steamship Corp., 736 Union St., New Orleans, LA; Washington International Ins. Co.	June 4, 1981	June 4, 1981	New Orleans, LA $10,000
Gdynia America Line Inc., One World Trade Center, New York, NY; Investors Ins. Co. of America. (PB 4/30/75) D 4/30/81 [3]	May 1, 1981	May 1, 1981	New York Seaport $10,000
Jack B. Kelly Inc., 66 West Kelly Dr., Amarillo, TX; Peerless Ins. Co. D 6/13/81	Mar. 15, 1978	Mar. 15, 1978	New York Seaport $10,000
Meadows Wye & Co., Inc., 111 Broadway, New York, NY; Peerless Ins. Co. (PB 3/1/79) D 3/1/81 [4]	Mar. 2, 1981	Mar. 2, 1981	New York Seaport $10,000
Pacific Mexico Container Line (Paxicon), Inc., (a Calif. corp.), 300 Montgomery St., San Francisco, CA; Washington International Ins. Co.	Apr. 1, 1981	Apr. 1, 1981	Los Angeles, CA $50,000
Pacific Northwest Equipment Co., 1440 S. Jackson St., Seattle, WA; Washington International Ins. Co.	Apr. 1, 1981	June 16, 1981	Seattle, WA $10,000
Peninsula Plywood Corp., Port Angeles, WA; Federal Ins. Co. D 6/10/81	Apr. 15, 1968	Apr. 30, 1968	Seattle, WA $10,000

See footnotes at end of table.

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
Rio Grande Foods, Inc., 3701 W. Military Hwy., McAllen, TX; St. Paul Fire & Marine Ins. Co.	Mar. 27, 1979	Aug. 14, 1980	Laredo, TX $10,000
San Juan Cement Co., Inc., Km. 26.7, State Hwy. No. 2, Dorado, PR; Continental Casualty Co.	Apr. 3, 1981	Apr. 6, 1981	San Juan, PR $10,000

[1] Surety is Old Republic Ins. Co.
[2] Principal is Clou Containers Inc.; Surety is Old Republic Ins. Co.
[3] Surety is Peerless Ins. Co.
[4] Surety is Old Republic Ins. Co.

BON–3–10

MARILYN G. MORRISON,
Director,
Carriers, Drawback and Bonds Division.

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., August 3, 1981.

The following are decisions made by the United States Customs Service where the issues involved are of sufficient interest or importance to warrant publication in the Customs Bulletin.

DONALD W. LEWIS,
Director,
Office of Regulations and Rulings.

(C.S.D. 81-171)

Vessels: Vessels Used to Transport Offshore Fishing Parties from a United States Port and Back Constitutes Coastwise Trade

Date: January 15, 1981
File: VES-3-02-CO:R:CD:C
104932 PH

This responds to your letter of October 22, 1980, concerning the use of vessels to carry six or less passengers for hire in Michigan waters. In our letter of August 1, 1980 (VES-3-02-RRUCDC 104767 PH), we supplied you with general information on this subject.

You state that the vessels under consideration were built in the United States, are owned by United States citizens, and are between 5 and 20 net tons. The vessels carry 6 or less passengers for hire on fishing parties, excursions, and other activities. You describe a sample itinerary for one of the vessels as follows: The vessel departs port "A" at 7 a.m., navigates out onto a Great Lake less than 20 miles and may or may not cross state lines or international boundaries, and returns to port "A" at 1 p.m. or 5 p.m., depending on whether the trip is for a half-day or whole day. You contend that these vessels are not engaged in the coastwise trade and, therefore, are not required to be documented.

As Mr. Joseph A. Yglesias of the U.S. Coast Guard stated in his letter to you of June 26, 1980, a copy of which he forwarded to us, the Customs Service is responsible for determining whether or not a particular use of a vessel is coastwise trade. Based on our determination, the Coast Guard decides what, if any, documentation is required of the vessel.

In your letter, you note that we have ruled that the transportation by a foreign-built vessel of passengers to the high seas or foreign waters and back to the port of embarkation is not considered coastwise trade. This position is based upon an opinion of the Attorney General (29 O.A.G. 318 (1912)), which you cite.

You contend that if the transportation described in the previous paragraph is not considered coastwise trade for a foreign-built vessel, it should not be considered coastwise trade for a United States-built vessel. You are correct. Transportation of passengers from a United States port to the high seas or foreign waters and back to the port of embarkation is not considered coastwise trade whether performed by a foreign-built or United States-built vessel.

The transportation described by you, however, appears to involve voyages in which passengers are transported solely in United States territorial waters and returned to the port of embarkation. The Attorney General's opinion did not address such transportation. The material you quoted on this subject (incorrectly attributed by you to Justice McKenna in his opinion in *United States* v. *Baltimore and Ohio Southwestern Railroad Co.*, 222 U.S. 8; the quoted material is actually from the text of the Attorney General's opinion (29 O.A.G. 318, at 321)) concerns transportation which is "not coastwise, but outward, *into foreign waters* * * *." (Emphasis added.)

On June 11, 1900, the Treasury Department ruled that the use of a Canadian vessel for the purpose of taking passengers on "short excursions" from the port of Duluth and back contravened the provisions of 46 U.S.C. 289 (T.D. 22275, copy enclosed). We note that it is approximately 150 miles from Duluth to the international boundary in Lake Superior and, therefore, assume that these "short excursions" did not encompass transportation to the high seas or foreign waters. Thus, transportation of passengers from a United States port solely into territorial waters and back to the port of embarkation has been considered coastwise trade at least since 1900. We have been unable to find any ruling after the 1900 decision which holds such transportation to be other than coastwise trade. In fact, our rulings consistently follow the position enunciated in that decision. Accordingly, it is our conclusion that although the transportation of passengers from a United States port to the high seas or foreign waters and back to the port of embarkation is not considered coastwise trade, the trans-

portation of passengers from a United States port on a voyage *solely* within United States territorial waters and back to the port of embarkation is considered coastwise trade.

You also state that you seriously doubt the validity of Treasury Decision 55193(2), under which operations of vessels carrying offshore fishing parties for hire, whether or not the trips extend beyond territorial waters, are considered to be predominantly coastwise in nature. This position is based on a ruling by the predecessor to the Customs Service in the administration of the coastwise and other navigation laws. (See, Bureau of Navigation and Steamboat Inspection Circular Letter No. 103, June 3, 1936, copy enclosed, in which it was held that "a vessel employed in the business of taking out fishing parties is not construed as engaged in the fisheries and should be licensed only for the coasting trade * * *.") The position stated in Treasury Decision 55193(2) has been followed consistently since its publication in 1960. Accordingly, it continues to be our position that vessels used to transport offshore fishing parties from a United States port and back to the port of embarkation are considered to be engaged in coastwise trade whether the vessels transport the fishing parties solely within United States territorial waters or to the high seas or foreign waters.

If you have any further questions concerning this matter, please feel free to call upon us.

(C.S.D. 81–172)

Classification: Exemption From Quota Restraints, Pursuant to Item 950.10D, TSUS, Soft Ripened Cheeses Made From Mixtures of Cow's Milk and Other Animals

Date: February 10, 1981
File: CLA-2:CO:R:CV:G
065783 LCS

This is reply to your letter of November 26, 1980, in which you requested Headquarters, United States Customs Service, to issue a ruling interpreting the provisions of item 950.10D, Tariff Schedules of the United States (TSUS), in such a way so as to preclude the imposition of quota restraints on importations of soft ripened cheeses made from a mixture of cow's milk and milk from other animals, notably goat's and sheep's milk.

Item 950.10D, TSUS, provides that:

> [c]heeses and substitutes for cheese provided for in items 117.75 or 117.88, [TSUS], (*except* cheese not containing cow's milk and *soft ripened cow's milk cheese* * * *) [emphasis provided]

shall be subject to the quota quantities, allocated by country, provided for therein.

Items 117.75 and 117.88, TSUS, provide for other cheeses and substitutes for cheese, other than sheep's milk cheese:

(1) valued not over 25 cents per pound; and
(2) valued over 25 cents per pound and other than Colbey or specific named cheeses made from cow's milk, respectively.

Accordingly, the United States Customs Service has, pursuant to these provisions, subjected certain entries (approximately 3 as of June 25, 1980) of soft ripened cheese made from a combination of cow's milk and other milk to quota restraint pursuant to item 950.10D, TSUS, since they were not "soft ripened cow's milk cheese," as they contained other milk as well, and since they were not "cheese *not* containing cow's milk."

It is your position, supported by our National Import Specialist at New York, that is was not the intention of the Multilateral Trade negotiators, or of those formulating the United States position prior to those negotiations (conducted and finalized in Brussels, Belgium, in March, 1979), for such a result and that the exemption for soft ripened cheeses from the quota restraints in item 950.10D, TSUS, was intended to apply without restriction to the kind of milk or milks from which such soft ripened cheeses were made.

We have been informed that the Customs Laboratory can determine the animal source or sources of milks contained in cheeses made from a mixture of milks; however, it cannot quantify the amount by percentage of each milk constituting such a cheese.

Based on information now before this Headquarters, it is obvious that the intent of the United States delegation to the Multilateral Trade Negotiations (MTN, together with its advisors in formulating this position, and their counterparts from the European Economic Community) was clearly to exempt from quota restraint, pursuant to item 950.10D, TSUS, soft ripened cheeses made from mixtures of cow's milk and the milk of other animals. This determination is further supported by the fact that soft ripened cheeses and substitutes for cheese wholly of cow's milk or wholly of milk from other animals, classifiable under either items 117.75 or 117.88, TSUS, are exempt from quota restraint pursuant to item 950.10D, TSUS.

Therefore, to give force and effect to the intent of the MTN and to Presidential Proclamation 4708 of December 11, 1979, Headquarters, United States Customs Service, has determined that the exemptions from quota restraints applicable to: 1) soft ripened cow's milk cheese; or 2) cheeses not containing cow's milk, pursuant to item 950.10D, TSUS, shall be interpreted and applied to exempt from quota restraint under this provision soft ripened cheeses made

from mixtures of cow's milk and the milk of other animals (*e.g.*, sheep's and/or goat's milk) irrespective of the percentages of such milks present, insofar as the cheeses in question meet all other requirements of Headnote 3(a)(iv), Part 3, Appendix to the TSUS, defining the term "soft ripened cow's milk cheese."

(C.S.D. 81-173)

Drawback: Denial of Drawback, Pursuant to 19 CFR 22.13(a), When Claimant Fails to Make Timely Submission of Proof of Exportation or Certificates of Manufacture

Date: February 11, 1981
File: DRA-1-CO:R:CD:D B 211999

Re: Further review of Protest 28098-001280 of October 19, 1978 (Protests 28098-001435, -001394, -001381, and 001314 suspended)

REGIONAL COMMISSIONER OF CUSTOMS
San Francisco, CA.

DEAR SIR: These protests and request for further review were filed against your decision to liquidate 69 drawback entries filed during the period April 16, 1973 through November 4, 1974, "no drawback." The articles covered by the claim for drawback, pants pockets, were exported in 1971 and 1972.

ISSUE

Based on the facts presented, was the drawback claimant entitled to an extension of the 3-year period after exportation in which drawback claims must be completed by filing of an entry and certificate of manufacture?

FACTS

The protestant received approval of a drawback proposal on December 11, 1973. The approved contract covered cotton drill which was to be cut into pants pockets, upon which drawback would be claimed upon exportation. Sixty-nine drawback entries were filed during the above-noted period along with two certificates of manufacture. The drawback entries upon examination were found to be lacking certificates from the Government waiving drawback, as required by section 22.42 of the regulations, notices of exportation or bills of lading as required by section 22.7 of the regulations, and certificates of manufacture or reference to certificates of manufacture numbers covering the exported pockets.

Not having received proof of exportation or certificates of manufacture, the Regional Commissioner advised the protestant by letter of December 29, 1977, that drawback could not be allowed on the 69 entries. After conversations with protestant's counsel, regional

liquidators agreed on February 14, 1978 to suspend action pending a study of which records would be acceptable to establish timely use of the drill under drawback regulations. No further information was forthcoming and the entries were sent to liquidation, where the claims were liquidated "no drawback" in July 1978. Timely protests were filed. A denial was issued in 2809–8–001280 and the remainder were suspended pending further review of that protest.

LAW AND ANALYSIS

Section 22.13(a), Customs Regulations, provides in pertinent part:

> A drawback entry and certificate of manufacture shall be filed within 3 years after the date the articles were exported. . . . Claims not completed within the 3-year period prescribed above shall be treated as abandoned and no extension will be granted, unless it is established that failure to complete the claim within 3 years was occasioned by the action of a responsible Customs officer.

Counsel claims that had the letter of December 29, 1977 referred to under FACTS been sent earlier, immediately after the claims were filed, proper documentation would have been submitted by the protestant. This is an indirect argument that Customs personnel did not notify protestant of the entries' inadequacies until after the 3-year period had run.

The first entry was filed with the District Director on August 4, 1974, and we must assume all entries were timely. The District forwarded the entries to the Region and according to the file counsel for protestant was contacted by phone in August, 1974, and again in December 1974, regarding exportation certification. The Region returned the drawback entries to the District Director on November 11, 1974, with directions to have protestant indicate a Certificate of Manufacture for the exported articles and to furnish the Government certificate required by section 22.42 of the regulations. It is not clear when the District returned the entries to protestant, but the entries were not returned to Customs until January 30, 1978, without any corrections. Counsel for protestant had been asked by the Region to submit Certificates of Manufacture and certified bills of lading on July 16, 1976, however. In any case, it is clear Customs personnel notified the protestant of the shortcomings long before the expiration of the 3-year period.

Finally, counsel refers to a discussion with the Chief Liquidator at San Francisco in the Fall of 1977, wherein the type of evidence necessary to establish use of the designated merchandise was discussed. Evidently "cutting reports", which would establish use were discussed. but counsel states it is "not practical" to maintain these reports over a period of time.

Six years from exportation to liquidation are sufficient to document properly and complete a drawback claim. The record indicates that protestant and its counsel were notified of the shortcomings long before the letter of December 29, 1977. The record does not indicate any action or inaction on the part of Customs which could be said to have delayed or hindered protestant from completing its claims.

HOLDING

The protest is denied. The entries are returned herewith.

(C.S.D. 81-174)

Classification: The Dutiable Status Of Financial Assistance Furnished To A Foreign Assembler

Date: February 12, 1981
File: CLA-2:R:CV:V
542166 MK
TAA # 17

This refers to your letter of July 22, 1980, requesting a ruling on the dutiable status of financial assistance you furnish to your Mexican assembler. We apologize for our delay in replying.

The assistance you are providing is an interest-free loan. Your specific question is whether the interest the assembler would normally have to pay the lender for this loan is a dutiable assist under 19 U.S.C. 1401a(h)(1)(a). As you correctly noted, the statutory definition of the term "assist" does not include financial assistance supplied by the buyer. We therefore conclude that neither the financial assistance you provided, nor the interest which would normally have to be paid, absent that financial assistance, is considered to be an "assist" within the statutory definition of that term under the Trade Agreements Act of 1979.

(C.S.D. 81-175)

Classification: A "CAP" Payment Received by an Exporter Cannot be Used to Reduce Production Costs of Merchandise Appraised Under Sec. 402a(f), TA of 1930, as Amended.

Date: February 12, 1981
File: CLA-2: RRUCV
542290 BS

To: Area Director of Customs, New York Seaport.

From: Director, Classification and Value Division.

Subject: Reconsideration of Internal Advice No. 173/79; Appraisement of Confectionary Items Imported from the United Kingdom

ISSUE

Whether "CAP" payments made to the exporter may be used to reduce the cost of production of certain merchandise appraised under section 402a(f), Tariff Act of 1930, as amended.

BACKGROUND

This issue has been the subject of two previous Headquarters rulings, dated September 21, 1979, and February 27, 1980. After the second ruling had been issued the Acting Area Director, New York Seaport, requested a reconsideration. The importer takes issue with the Acting Area Director's position and has submitted additional legal arguments addressing the relevant questions.

FACTS

The imported merchandise consists of certain confectionary items produced in Great Britain, the exporting country. In order to manufacture this merchandise, the exporter utilizes substantial quantities of sugar, which is imported into Great Britain, a country which belongs to the European Economic Community (EEC).

If the world price of sugar is below the EEC price, a levy is placed upon the sugar when it enters the EEC country based on the current differential. On the other hand, if the world price of sugar is above the EEC price, then the importer (of the sugar) receives the difference between the EEC price and the world price. Similarly, if the sugar is exported (as in the case of the subject confectionary items), the exporter either receives a "CAP" payment or may pay a levy, depending upon the EEC price of sugar at that time in relation to the world price.

There is no direct relationship between the levy paid upon importation (if applicable) and the CAP payment that may be received. Thus, it is theoretically possible that the exporter may pay a levy upon importation of sugar into Great Britain and pay an additional levy upon exportation to the United States.

In the instant case, the exporter paid a levy when the sugar entered Great Britain and (the record establishes) was entitled to a CAP payment when the confectionary items were scheduled for export to the United States (which obviously was prior to exportation).

LAW AND ANALYSIS

Section 402a(f) of The Act provides that the cost of production of imported merchandise shall include "* * * the cost of materials * * *

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employed in manufacturing or producing such or similar merchandise, *at a time preceding the date of exportation of the particular merchandise under consideration which would ordinarily permit the manufacture or production of the particular merchandise* under consideration * * *." (Emphasis added.)

The importer contends that:

> (1) The "real" costs of production must take into account the amount of levies paid or payments received at the time of manufacture and prior to exportation; and that the date of filing the export schedules is within the time "preceding the date of exportation which would ordinarily permit the manufacture" of the goods. This means that if a CAP payment is received at the time of scheduling, the cost of materials would be *reduced* by that amount; however, if a CAP levy is paid at the time of scheduling, then the cost of materials would have to be *increased* by that amount. (Emphasis added.)
>
> (2) Assuming CAP payments are made on a daily basis, they reduce the cost to the exporter of sugar to be used in the next batch to be produced in the next few hours. Thus, on any given day, the CAP payments are received by the exporter prior to the next production run and therefore are reducing the actual cost of sugar for the next run.
>
> (3) CAP levies are not unavoidable costs nor can the CAP payments be viewed as "refunds" of earlier paid CAP levies, since they are totally unrelated to one another.

In *Charles Stockheimer* and *Inter-Maritime Forwarding Co., Inc.* v. *United States*, 44 CCPA 92, CAD 642 (1957), the court held that the language of the subject statute fixes the cost of materials with respect to a definite time, that is, *the latest time which would permit delivery of the materials on the date when manufacture of the merchandise was commenced.* (Emphasis added.) The court stated that if the producer had actually made a purchase at the time specified, the price paid would fix the statutory cost of materials and that if he had not, the cost would be the price for which he might have made a purchase at such time.

It follows that since the cost of materials is determined as of a specific time, which is at or prior to the date of manufacture of the merchandise, refunds, rebates, or other such payments which may be received thereafter, may not be considered in determining statutory cost of production. Similarly, additional payments made by the manufacturer subsequent to this point in time may not be used to increase the cost of production.

Most of the decisions in this area have involved taxes or levies that were refunded upon exportation. Thus, in *Schweppes (U.S.A.), Ltd.* v. *United States*, A.R.D. 111, 43 Cust. Ct. 608 (1959), an excise tax was computed as an element in the cost of materials for cost of

production purposes, even though the full amount was refunded upon exportation. While the excise tax was found to be "* * * bound up with the other costs of the ingredients to the manufacturer and an integral part of the cost of materials, * * *", the court held that the refunds of the excise tax, contingent upon the exportation of the merchandise, did not reduce the cost of the materials. The court cited *Stockheimer*, as follows:

> * * * the quoted language refers to the *latest* time which permits such production, *since if the reference were to any time sufficiently early to permit production it would be wholly indefinite.* (Emphasis added.) The section (section 402a(f)), fixes cost of materials with respect to a definite time and without reference to who the purchaser may be or whether a purchase is actually made.

An analagous situation can be found in *Adolph Goldmark & Sons Corp.* v. *United States* (31 CCPA 6, C.A.D. 241 (1943)), which involved the determination of the component material of chief value of marmalade, manufactured from sugar and oranges. The court held in that case that a drawback of duty on sugar, received upon exportation of the marmalade, could not be considered in computing the component material of chief value.

In the above cases, the key factor was not that the drawback or refund was received upon or after exportation, but rather that such payments became effective after the merchandise had been manufactured, in accordance with the *Stockheimer* interpretation of the statute. We see no difference in the result when the principles of *Stockheimer*, *Schweppes*, etc., are applied to the facts involved in the instant case. Whether or not the CAP payments are a dollar-for-dollar refund is irrelevant. What is relevant is that these payments are legally due after the time required by the statute to fix the cost of materials, i.e., after the latest time which would permit production of the merchandise. Nor can such payments be used to reduce the cost of sugar used on the following day, since the payment is based on the quantity of merchandise manufactured on the day of scheduling and has no relevance to the cost of a different batch of sugar used to produce confectionery items scheduled for exportation on the following day. It also follows that if a CAP levy was imposed at the time of export scheduling, rather than a CAP payment received, this would similarly have no effect upon the cost of materials for statutory cost of production purposes.

While we are aware of what the manufacturer may consider to be his actual costs, this is irrelevant in determining the cost of materials

under the statute. Thus in *Schweppes, supra,* the court made the following comments:

> * * * we are constrained to observe that the Congress has, in section 402(f), *supra,* laid down a complete and inclusive formula for determining cost of production, and if a literal construction of its provision tends to bring about inequities, it is not the function of this court to relieve against them.

In recognizing certain inequities inherent in the statute, the court noted that the Customs Simplification Act of 1956 had remedied the problem (at least in that fact situation) in connection with merchandise appraised under the new constructed value basis of appraisement, by excluding from the cost of materials "* * * any internal tax applicable in the country of exportation directly to such materials or their disposition, but remitted or refunded upon the exportation of the article * * *". The court specifically pointed out that this was a change in the law and not a mere classification of the cost of production statute.

Under the circumstances, the subject levy imposed upon the sugar when entering the exporting country must be included in ascertaining the cost of materials under the statutory cost of production appraisement. On the other hand, a CAP payment received prior to the date of exportation but after "the latest time" which would permit production of the subject merchandise cannot serve to reduce the cost of materials.

(C.S.D. 81-176)

Drawback: Allowance of Drawback Under 19 U.S.C. 1313(c) When Ordered Merchandise Does Not Conform to Preimportation Standards and Specifications

Date: February 17, 1981
File: DRA-1-09-R:CD:D B 212529

Re: Further Review of Protest 4101-0-00062 of October 30, 1980—Drawback 19 U.S.C. 1313(c)

REGIONAL COMMISSIONER OF CUSTOMS,
Chicago, IL.

DEAR SIR: The referenced protest is the outgrowth of a decision by the District Director, Cleveland, refusing drawback of duties paid on 78 mobile X-ray units claimed by the importer as not meeting specifications. Claim for drawback on seven of the machines has been abandoned by the protestant.

ISSUE

May drawback under 19 U.S.C. 1313(c) be obtained based on failure of the merchandise ordered to meet an indirect specification of the importer/claimant?

FACTS

Protestant ordered 100 mobile X-ray units from a manufacturer in Japan. After importation of 78 of these battery-operated models, the units were returned to the manufacturer after first being returned to Customs at Cleveland for examination, although the return occurred more than ninety days after release from Customs custody. The units were supposedly exported from Baltimore but apparently no proof of exportation has been submitted for some of the units. Drawback entries under 19 U.S.C. 1313(c) were filed on May 31, 1979; and on July 22, 1980, protestant requested drawback in a letter to the District Director, Cleveland, informing him that protestant was "in process" of returining the units to Japan. Protestant at that time claimed the inverter circuits of the imported units failed to meet the output of an American-made mobile unit in protestant's possession. On July 28, 1980, the protestant was informed in writing by an import specialist simply that "This office is unable to comply with your request" and recommended that a protest be filed if "you want to pursue this matter." No reason was given for the denial of drawback.

Protest was timely filed on October 30, 1980, liquidation having occurred on August 1, 1980.

In reply, the District Director denied the protest because "Specific specifications regarding radiation output were not furnished timely to the manufacturer."

LAW AND ANALYSIS

1. Section 1313(c), Title 19, United States Code, provides for a refund of 99 percent of duties paid on merchandise not conforming to sample or specification, or shipped without the consent of the consignee, provided the merchandise is returned to Customs within 90 days of the date of release from Customs custody.

We note the units were not returned to Customs custody within 90 days as prescribed in the law, nor has proof of exportation been provided for each claim. Protestant alleges on the face of the protest that the "units were returned to supplier under proper drawback procedure (CR 22.31)." Yet each drawback entry was denied solely because "Claimant did not establish that the merchandise failed to conform to the sample or specifications of the order." The forms used for denying the entries specifically refer, under DRAWBACK DENIED FOR THE REASON(S) NOTED BELOW, to merchandise

not returned timely to Customs custody and failure to provide signed bills of lading within two years. These reasons were not noted as bases for denial of drawback.

The doctrine of equitable estoppel cannot be invoked by the protestant for failure to supply proof of exportation for some claims inasmuch as there is no allegation that it acted to its detriment because Customs did not use this failure as a reason for denying the claims. Timely redelivery to Customs and exportation are required by the law to obtain drawback.

In regard to the issue of untimely delivery, however, the fact that Customs accepted the goods for examination after expiration of the 90-day period constitutes an implied granting of an extension of that period. Moreover, acceptance by Customs in this instance might very well support a claim of equitable estoppel by protestant regarding this issue.

Proof of exportation is another matter. Section 1520(c)(1), Title 19, United States Code, provides:

> (c) Notwithstanding a valid protest was not filed, the appropriate customs officer may, in accordance with regulations prescribed by the Secretary, reliquidate entry to correct—(1) a clerical error, mistake of fact, or other inadvertance not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transactions, when the error, mistake, or inadvertance is brought to the attention of the appropriate customs officer within one year after the date of liquidation or exaction . . .

Exportation apparently occurred no earlier than May 31, 1979 and the entries were liquidated on August 1, 1980. To complete the drawback claim, an appropriate bill of lading must be filed within two years of the date of exportation, as required by section 22.29(d) of the regulations. The protestant still has time (at least until May 30, 1981) to file the appropriate proof of export. Although liquidation has become final, if the protestant can show failure to submit proof of exportation resulted from a mistake or inadvertance as set out in 19 U.S.C. 1520(c)(1), the claims which could be denied for failure to prove exportation would be reliquidated, if notice of a claim under that section is made on or before July 31, 1981. Negligent inaction on the part of protestant in not filing the bills of lading does not constitute a "clerical error, mistake of fact, or other inadvertance." We are in no position to rule on this aspect of the case, lacking a claim under 1520(c)(1) and not having any facts as to the cause of failure to file proof of export.

2. The burden of showing failure to meet specifications, as set out in section 22.32(b) of the regulations, is on the claimant (*Border*

Brokerage Co.—A. G. Grasher v. *United States*, 53 Cust. Ct. 6, C.D. 2465). That section provides in relevant part:

> * * * If the goods are claimed to be not in accordance with sample or specifications, the drawback entry shall be accompanied by a copy of the order for the merchandise, copies of any preliminary correspondence, and the samples or specifications on which the merchandise was ordered together with a certificate of the actual owner that the sample or specifications submitted are those on which the merchandise was ordered, showing in detail in what manner the merchandise does not conform to sample or specifications. If no written order was placed and no sample or specifications are available, a certificate of the actual owner setting forth the specifications of the order and the manner in which they were communicated to the seller may be accepted * * *

According to a chronological summary of the facts prepared by the seller, in 1972 protestant asked the manufacturer/seller to develop a model unit similar to a U.S.-made model. The seller decided at that time such a unit was "too early" for the market. Upon seeing goods sales of the U.S. unit in November, 1974, the protestant informed the manufacturer/seller that the protestant intended to develop such a unit itself or the seller "should do it." At this time, the seller initiated a development plan.

Specifications were prepared by the protestant and a sample competitive U.S. unit was acquired by protestant and provided to the manufacturer/seller to promote the development.

After the models were produced by the seller and imported by protestant, a customer discovered that the inverter circuit failed to meet the output of the U.S. competitive model. The imported product's radiation per unit of time output was 30–40 percent less than the competitive model.

Further, along with its letter of July 22, 1980, to the District Director, protestant enclosed copies of specifications dated December 20, 1977. Protestant also enclosed an advertising brochure setting forth these specifications, and with the language "The (X) unit is useful in any application normally requiring the advantages of mobile radiographic unit." According to the protestant the lower output generated by the inverter circuit results in X-ray overdosages and lower quality film images.

Protestant also forwarded a letter dated September 25, 1980, from a radiological physicist with 12 years' experience, whose expert opinion is that protestant was entitled to expect only a plus or minus 10 percent deviation in the inverter output as expressed in the formula: exposure rate X current through tube X exposure time. The physicist further states that the inverter circuit output range was specified when the

protestant specified the peak voltage (kVp) and the current through tube X exposure time (mAs).

Lastly, we note that 100 units were ordered but the problems were discovered before the entire purchase order was filled. The seller agreed to the return of the 78 units sent and accepted responsibility for payment of all freight charges.

Based on the foregoing, we believe that protestant more than adequately has complied with section 22.32(b) of the regulations (see *Lansing Company, Inc.* v. *United States*, 77 Cust. Ct. 92, C.D. 4675).

Protestant's reliance on C.S.D. 80–187 is well-founded. That decision allowed drawback upon discovery by the manufacturer of a latent defect in the imported article, and notification given by the manufacturer to the importer/claimant. The same result would have ensued had the latent defect been discovered by the importer/claimant. In this case, such defect was discovered by protestant's customer who notified protestant.

HOLDING

The protest is sustained on all entries for which proper proof of exportation has been submitted. We are reserving our ruling on the remaining entries pending protestant's timely submission of proof exportation and resolution of any timely claim which may be made pursuant to 19 U.S.C. 1520(C)(1). All entries are returned herewith.

(C.S.D. 81–177)

Vessels: The Application Of The Coastwise Laws To The Shipment Of Food Commodities By An Agency Of The U.S. Government

Date: February 18, 1981
File: VES–3–07 CO:R:CD:C
VES–3–08
104942 MKT

This ruling concerns the application of the coastwise laws to the shipment of food commodities by an agency of the United States Government from the U.S. West Coast to the Northern Mariana Islands.

ISSUE

Whether section 502(b) of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union With the United States of America ("Covenant") (title 48, United States Code, section 1681 note) requires that an agency of the United States Government employ coastwise-qualified vessels to transport food commodities from the U.S. West Coast to the Northern Mariana Islands.

FACTS

The Agricultural Stabilization and Conservation Service (ASCS) of the Department of Agriculture procures food commodities for another agency of the Department, the Food and Nutrition Service (FNS), for shipment to the Northern Mariana Islands as part of an FNS program. Presently, the ASCS employs a foreign-flag vessel to transport the food commodities from distribution centers on the U.S. West Coast, including one in San Francisco, to the Northern Marianas. ASCS switched to foreign-flag vessels after it found the service on United States-flag vessels to be unacceptable.

LAW AND ANALYSIS

Section 503(b) of the Covenant excepts the Northern Mariana Islands from the general application of the coastwise laws by providing that:

> The following laws of the United States, * * * will not apply to the Northern Mariana Islands except in the manner and to the extent made applicable to them by the Congress by law after termination of the Trusteeship Agreement:
>
> (b) Except as otherwise provided in Subsection (b) of Section 502, the coastwise laws of the United States * * *.

Section 502(b) of the Covenant makes the laws regarding coastal shipments applicable to the Northern Mariana Islands to a limited extent. Section 502(b) reads, in pertinent part, that:

> The laws of the United States regarding coastal shipments * * * will apply to the activities of the United States Government and its contractors in the Northern Mariana Islands.

Among the coastwise laws, the law regarding coastal shipments that concerns the transportation of merchandise, which is at issue here, is title 46, United States Code, section 883 (46 U.S.C. 883), also known as the "Jones Act". Section 883 prohibits a non-coastwise-qualified vessel from transporting merchandise between points embraced within the coastwise laws, directly or via a foreign port, for any part of the transportation.

To reach our decision on the application of section 883 to the Northern Mariana Islands, we have reviewed the legislative history of the Covenant. The Senate Committee on Interior and Insular Affairs Report on H.J. Res. 549 (S. Rep. No. 94–433, 94th Cong., 1st Sess. (1975)), which was enacted as the Covenant, states that:

> This provision [section 502(b)] is important because those laws [concerning coastal shipments and the conditions of employment] will be generally inapplicable to the Northern Mariana Islands until the Congress undertakes to fully apply these laws

to the Northern Mariana Islands as provided in section 503 (b) and (c). (S. Rep. No. 94–433, 94th Cong., 1st Sess. 77 (1975)).

The specific reasons for applying the laws regarding coastal shipments to the Government or its contractors when the coastwise laws do not apply to the Northern Mariana Islands generally are not discussed in the legislative history of the Covenant. However, the reason for making the coastwise laws generally inapplicable to the Northern Mariana Islands is stated in the *Hearings to Approve the Covenant to Establish a Commonwealth of the Northern Marianas on H.J. Res. 549 Before the House Committee on Interior and Insular Affairs*, 94th Cong., 1st Sess. 642 (July 14, 1975).

The hearings on H.J. Res. 549 reprinted the section-by-section analysis of the Covenant made by the Marianas Political Commission, dated February 15, 1975. The analysis was prepared to explain the features of the Covenant to the local people so that they could make an informed decision to vote to accept or reject its terms. That analysis says with regard to the general application of the coastwise laws that:

> The coastwise laws are generally applicable throughout the United States and apply to Guam. Because shipping rates on American vessels are higher than on foreign vessels, the application of the coastwise laws, also known as the "Jones Act", can have a detrimental effect on local industry and can significantly increase the cost of consumer products. It is therefore desirable to keep these laws from applying at least until after termination of the Trusteeship. (*Hearings to Approve the Covenant to Establish a Commonwealth of the Northern Marianas on H.J. Res. 549 Before the House Committee on Interior and Insular Affairs*, 94th Cong., 1st Sess. 642 (July 14, 1975); also published in *Northern Mariana Islands: Hearing on S.J. Res. 107 Before the Senate Committee on Interior and Insular Affairs*, 94th Cong., 1st Sess. 414–415 (July 24, 1975)).

The House Committee on Interior and Insular Affairs hearing on H.J. Res. 549 also contained an analysis of the Covenant that states:

> The immediate introduction of those laws [The coastwise laws of the United States and the prohibitions against foreign-flag vessels landing fish or unfinished fish products in the United States] into the Northern Mariana Islands may cause serious economic dislocation. For that reason their introduction should await special scrutiny to be made after the establishment of the Commonwealth. (*Hearings to Approve the Covenant to Establish A Commonwealth of the Northern Marianas on H.J. Res. 549 Before the House Committee on Interior and Insular Affairs* 94th Cong., 1st Sess. 389 (July 14, 1975)).

From these references that discuss the Jones Act only as it operates in its general application and from the lack of any indication that the

exception in section 502(b) is to be applied in an unusual manner, we conclude that the geographic limitation of section 502(b) is not intended to limit the application of the Jones Act to the transportation of merchandise by the Government or its contractors merely from one island in the Northern Marianas to another such island. We conclude instead that section 502(b) is intended to make the Jones Act apply to the Northern Mariana Islands in its usual sense when merchandise is transported by the Government or its contractors to any place in the Northern Mariana Islands from another coastwise point, or between places in those islands, only when the merchandise is transported to carry out an activity of the Government or its contractors in those islands.

We consider the distribution of the food commodities by the FNS in the Northern Mariana Islands to be an "activity" in the Northern Mariana Islands within the meaning of the Covenant. Therefore, a coastwise-qualified United States-flag vessel must be employed to transport the food commodities from any other coastwise point to the Northern Mariana Islands by the Government or its contractors.

Because the use of foreign-flag vessels is prohibited, any merchandise transported by your agency from the U.S. West Coast to the Northern Mariana Islands may be subject to the assessment of a monetary penalty equal to the value of the merchandise in accordance with 46 U.S.C. 883. Ordinarily, the merchandise would be subject alternatively to the penalty of forfeiture under section 883. However, the Attorney General has ruled that Government merchandise is not subject to forfeiture (26 O.A.G. 415, 417; 426–430 (1907)).

Customs currently is considering whether a monetary penalty may be assessed pursuant to 46 U.S.C. 883 against the Government or its contractors, and if so, whether it may be assessed retroactively or prospectively only. We will inform you of our decision when it is made.

HOLDING

Section 502(b) of the Covenant to Establish a Commonwealth of the Northern Mariana Islands (48 U.S.C. 1681 note) requires that an agency of the United States Government employ coastwise-qualified vessels to transport food commodities from the West Coast to the Northern Mariana Islands in accordance with 46 U.S.C. 883. Customs currently is considering and will inform you of our decision on whether a monetary penalty may be assessed, pursuant to 46 U.S.C. 883, against the Government or its contractors, and if so, whether it may be assessed retroactively or prospectively only.

EFFECT ON OTHER DECISIONS

None.

(C.S.D. 81–178)

Vessels: Application of 19 U.S.C. 1466 to foreign-flag vessels carrying U.S.-flag LASH barges subjected to repairs on the high seas by regular crew members

Date: February 19, 1981
File: VES–13–18–CO:R:CD:C
104972 JL

This ruling concerns the application of 19 U.S.C. 1466 to LASH barges.

ISSUES

(1) Must repairs made to a U.S.-flag LASH barge on the high seas by members of the regular crew of its foreign-flag carrying vessel be reported to Customs pursuant to 19 U.S.C. 1466(a)?

(2) Are members of the regular crew of a foreign-flag vessel carrying U.S.-flag LASH barges also members of the regular crew of such barges for the purposes of 19 U.S.C. 1466 (a) and (d)(2)?

FACTS

Repairs to U.S.-documented LASH (Lighter Aboard Ship) barges are being performed by the regular crews of foreign-flag carrying vessels while on the high seas. The owner of the barges claims the repairs are not dutiable by virtue of the fact that they are performed on the high seas rather than in a foreign country. The district director suggests that remission may be authorized under 19 U.S.C. 1466(d)(2).

LAW AND ANALYSIS

Title 19, United States Code, section 1466(a) (19 U.S.C. 1466(a)), provides for a 50 per centum ad valorem duty on the cost of foreign repairs and equipment purchases for certain U.S.-flag vessels except that compensation paid for such work to the regular crew of the vessel shall not be included in the cost thereof. Section 1466(d)(2) provides that the duty may be refunded or remitted if the parts used or equipment installed were of U.S. production or manufacture and the labor was performed by U.S. residents or members of the regular crew of the vessel.

LASH barges are unmanned non-self-propelled cargo barges that are transported on larger vessels in foreign trade. Upon reaching the foreign port, the carrying vessel discharges the barges, which are then towed to a secondary destination where they are unloaded. The Customs Service has consistently held that such barges are vessels that are subject to the imposition of repair duties under 19 U.S.C. 1466. (Headquarters Letter August 31, 1973, case 100348.) We have

also held that these barges, although unmanned and utilized in many respects as cargo containers while being transported on board larger vessels, are nevertheless vessels separate and apart from their carrying vessels. This is so notwithstanding the fact that the master of a carrying vessel, if the owner of the barges elects, may present vessel repair declarations and entries for the barges. (Headquarters Ruling October 3, 1978, case 103573.)

These barges, as pointed out above, have no crew. It would be patently inconsistent to hold that the barges here under consideration have identities separate and apart from the transporting vessel, which identities as U.S.-flag vessels subject them to the duties imposed by 19 U.S.C. 1466(a), and simultaneously hold that crewmembers of the carrying vessel are also crewmembers of the barge under the statute.

As to whether repairs performed to U.S.-flag vessels on the high seas are performed "in a foreign country" within the meaning of 19 U.S.C. 1466(a), the Customs Service held in 1956 that they were not performed in a foreign country within the meaning of the vessel repair statute. (Bureau Letter October 15, 1956, to Collector N.Y., file 212.6.) However, in a later ruling abstracted as T.D. 69–252(1), it was held that the costs of repairs made by workmen signed on as auxiliary crewmembers for the purpose of performing repairs on the high seas between ports of call were dutiable under the statute because the workmen were not regular members of the crew. This approach was followed in subsequent cases (ORR Rulings 243–70 and 350–70), but the issue of the location of the repairs was not addressed.

It appears that the October 15, 1956, ruling was implicitly overruled in the later cases. If not, then there would be no question of the dutiability of the repairs under consideration in cases subsequent to the earlier ruling. The question presented was recently tried by the United States Court of International Trade in the case of *Mount Washington Tanker Company* v. *United States*, 1 C.I.T. ——, Slip Opinion 80–8, December 5, 1980. The Court held that repairs performed on the high seas were accomplished in a "foreign country" for purposes of 19 U.S.C. 1466(a).

HOLDINGS

(1) Repairs made to U.S.-flag unmanned barges on the high seas by the crew of a foreign-flag carrying vessel are performed in a "foreign country" for purposes of 19 U.S.C. 1466 and are subject to declaration, entry, and payment of duty.

(2) A LASH-type barge, being unmanned, cannot have a "regular crew" as that expression is used in 19 U.S.C. 1466 (a) and (d)(2).

Therefore, the crew of a barge-carrying vessel cannot be "the crew" of a LASH or other type of unmanned vessel.

(C.S.D. 81-179)

Drawback: Machining a Casting During a Repair or Assembling Parts Into an Article Renders the Imported Article Ineligible for Same Condition Drawback

Date: February 23, 1981
File: CO:R:CD:D
212643 WR

ISSUE

Whether machining an article or assembling parts into an article is an incidental operation so as not to be considered a use for the purpose of same condition drawback.

FACTS

1. A casting is imported into the United States for repair. The repair consists of machining the casting so that it can be re-used abroad.

2. A check valve is imported into the United States and then is assembled into a product for export.

A detailed description of either process was not provided.

LAW AND ANALYSIS

Section 313(J), Tariff Act of 1930, as amended (19 U.S.C. 1313(J)), provides for a refund of duty if a duty-paid article is exported in the same condition as when imported and was not used in the United States. The performance of incidental operations on the article such as testing, cleaning, repacking and inspecting it is not considered to be a use. The allowable limit for an operation is that it may not amount to a manufacture or production for drawback purposes.

Both the House and Senate Reports on P.L. 96-609, which added the provision to the drawback law make it clear that it was intended to supplement, rather than replace, the provisions for temporary importations under bond. H. Rept. 95-1109, 96th Cong., 17 (1980) and S. Rept. 96-999, 96th Cong., 23 (1980). A major purpose was to make imports eligible for drawback in those instances where the imported merchandise was not used and the importers were unable to anticipate the later need to export that merchandise.

It also seems clear that by the choice of the words "incidental operations" and the list of examples used in section 313(J), Congress

did not intend for the imported article to be changed. The machining of a casting so as to make that casting usable again changes the casting. The assembly of a valve into another article generally is considered to be a manufacture for drawback purposes.

HOLDING

Machining a casting during a repair of that casting or assembling parts into an article involves a use of the imported article which makes them ineligible for same condition drawback under 19 U.S.C. 1313(J).

(C.S.D. 81-180)

Classification: Molded Plastic Footwear Bottoms Manufactured in Taiwan are Classifiable as Unfinished Footwear in Item 700.60, TSUS

Date: February 24, 1981
File: CLA-2:CO:R:CV:G
066155 DFC

This ruling concerns the tariff classification of molded plastic footwear bottoms manufactured in Taiwan

FACTS

The sample, known as an "icicle" is a flat, clear or translucent piece of injection molded plastic in the shape of the bottom of the foot. It has a tread on its bottom surface and a vertical projection on the top surface in the arch area. This item is designed to be held to the wearer's foot by passing a lace through a vertical loop in the plastic which extends above the top surface between the wearer's big and second toes and then through two diagonal holes in the plastic behind the arch. This item does not have a lace in its condition as imported.

ISSUE

Whether "icicles" represented by the sample are considered unfinished footwear classifiable under item 700.60, Tariff Schedules of the United States (TSUS), or are classifiable under the provision for articles not specially provided for, of rubber or plastics: other: parts of footwear in item 774.50, Tariff Schedules of the United States (TSUS).

LAW AND ANALYSIS

General Headnote 10(h), TSUS, provides that "unless the context requires otherwise, a tariff provision for an article covers such article, whether assembled or not assembled and whether finished or not finished."

It is our view that General Headnote 10(h), TSUS, is in its essence prospective. A proper application of this headnote requires us to consider what an item will become in terms of its ultimate use or construction. In this respect your attention is invited to ORR Ruling 888 dated September 21, 1970, wherein this office stated with regard to the tariff classification of incomplete footwear of textile fibers that "Assuming, without granting that they are unfinished footwear, they are not susceptible of proper classification in their condition as imported and the Bureau is of the opinion that the unfinished principle of General Headnote 10(h) is not applicable to a product which, when the headnote is applied, is not susceptible of proper classification."

A survey has been conducted at various ports within the customs territory of the United States in order to determine the type of lace that is being sold with the molded plastic footwear bottoms. This survey indicated that almost 99 percent of the instant plastic bottoms have been sold with textile laces.

Inasmuch as the survey indicates that an overwhelming number of "icicles" are used with textile laces we are constrained to hold that the icicles are unfinished footwear.

Since our ruling in ORR 888, dated September 21, 1970, was issued regarding the classification of incomplete footwear, the court has redefined the substantially complete test in the case of *Daisy Heddon, Div. Victor Comptometer Corp.* v. *United States*, 66 CCPA 97, C.A.D. 1228, 600 F. 2d 799 (1979). In this case, the court held that incomplete fishing reels were classifiable as finished fishing reels although missing a number of components. The court in reaching its decision stated at page 801, that, "There are several factors which may come into play in the determination of whether an article is substantially complete. In a case, such as this, where the article is incomplete due to the omission of one or more parts, as opposed to where an article is incomplete because the material which comprises the article is in need of further processing, the following factors can be revelant: (1) Comparison of the number of omitted parts with the number of included parts; (2) comparison of the time and effort required to complete the article with the time and effort required to place it in its imported condition; (3) comparison of the cost of the included parts with that of the omitted parts; (4) the significance of the omitted parts to the overall functioning of the completed article; and, (5) trade customs, i.e., does the trade recognize the importation as an unfinished article or merely a part of that article."

In applying the first factor there is one omitted part and one included part. In this instance the first factor is inconclusive in determining whether the "icicle" is a part or is unfinished footwear.

With respect to the second factor, the omitted lace needs only to be threaded through the loop and rear holes. The time involved in threading the lace is but a few seconds and consequently this factor favors classification of the "icicle" as unfinished footwear.

With respect to the third factor, the cost of the omitted lace is considerably less than the cost of the plastic bottom. Thus, the application of this factor favors classification as unfinished footwear.

In applying the fourth factor there is no doubt that the absence of a lace is important. However, it is not extremely significant in this instance because of the unique character of the "icicle." With ordinary footwear the upper performs the function of protecting the instep, heel and sides of the foot. The lace used with an "icicle" performs no such function; it merely holds the "icicle" to the bottom of the foot. We would agree that application of this factor barely favors classification of the "icicle" as a part.

With respect to the fifth factor we have conflicting information as to whether the trade considers the "icicle" to be unfinished footwear. Consequently, application of this factor to the merchandise is inconclusive in determining whether the "icicle" is a part or is unfinished footwear.

A summary of the factors listed above shows two of the factors in favor of classification as unfinished footwear, one in favor of classification as parts, and two factors inconclusive in determining classification. We believe that on the whole, application of the factors to this unique type of footwear compels the conclusion that the "icicles" are unfinished footwear for tariff purposes.

"Icicles" without laces and "icicles" with textile laces do not have uppers with over 90 percent of the exterior surface area of rubber or plastics and consequently are precluded from classification under item 700.58, TSUS. Inasmuch as they are precluded from classification under item 700.58, TSUS, they fall within the basket provision of item 700.60, TSUS.

It has been asserted that "the imported article in its imported condition is totally incapable of use and unsaleable because one feature required to create a substantially complete article of footwear, to wit, the ability of such article to be worn on the foot, is not present at the time of importation and therefore the subject article cannot be considered an article of footwear."

We do not believe that the missing upper in this instance which renders the "icicle" unuseable as finished footwear disqualifies the incomplete "icicle" from classification as unfinished footwear. In the case of *The Kinney Co.* v. *United States*, 83 Cust. Ct. 137, C.D. 4831 (1979), the Customs Court responded to the importer's contention that unfinished flat metal pieces with enamel decoration have no use

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in their imported condition and thus could not be classified as parts of jewelry under item 740.38 TSUS, as follows:

> The implications of plaintiff's argument that these objects have no use at all in their imported condition would disrupt a basic statutory arrangement. If that reasoning were followed, no unfinished article could be classified in the provision for the finished article since it could always be argued that articles have no use in their unfinished state. Yet it is clear from general interpretative rule 10(h) that the tariff schedules contemplate that articles whose finished form can be definitely discerned are described by the provision for the finished article even if they are unfinished.

In conclusion we believe that using the rationale of ORR Ruling 888 or the guidelines set forth in the *Daisy Heddon* case, *supra*, the result reached is that the "icicles" in issue are unfinished footwear for tariff purposes.

HOLDING

The "icicles" are dutiable at the rate of 20 percent ad valorem under item 700.60, TSUS.

Pursuant to Schedule 7, Part 1, Subpart A, Headnote 3(b), TSUS, this unfinished footwear is subject to appraisement on the American selling price of the domestically produced Firence "Sun Skimmer" in the same state of completion.

ERRATUM

In Customs Bulletin, Vol. 15, No. 26, dated July 1, 1981, T.D. 81-168 should read as follows:

19 CFR Parts 103, 152, 175

(T.D. 81-168)

Customs Regulations Relating to Availability of Information

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document revises the Customs Regulations relating to the public disclosure of information. There have been substantial changes to the relevant law since publication of the prior regulations. The revision brings the regulations into conformity with the current law.

This action has been taken after publication of a notice of proposed rulemaking and careful analysis of public comment received.

These amendments do not constitute a major regulation within the meaning of Executive Order 12291, relating to Federal Regulation.

EFFECTIVE DATE: (30 days after publication in the Federal Register.)

FOR FURTHER INFORMATION CONTACT: Steven I. Pinter, Freedom of Information and Privacy Branch, U.S. Customs Service, 1301 Constitution Avenue NW., Washington D.C. 20229 (202-566-8681).

SUPPLEMENTARY INFORMATION:

BACKGROUND

A proposed revision of Part 103, Customs Regulations (19 CFR Part 103), relating to the public disclosure of information was published in the Federal Register on August 20, 1979 (44 FR 48709). This revision was deemed necessary due to the amendments to the Freedom of Information Act by Public Law 93-502, 80 Stat. 1561, and the conforming amendments to the Department of the Treasury regulations concerning public access to records (31 CFR Part 1)

published in the Federal Register on February 20, 1975 (40 FR 7439).

Part 103 sets forth procedures whereby the public may obtain access to records created and maintained by the United States Customs Service. The procedures involve the publication of certain information in the Federal Register, the public inspection or copying of information, and the submission of specific requests for records to Headquarters, United States Customs Service, or to offices of the regional commissioners of Customs. Also included are procedures for appeal of an initial administrative determination to deny such a request and a uniform schedule of fees for the search and duplication of Customs records. Officers of the Customs Service who are responsible for making the initial and appellate determinations as to whether a request for records shall be granted are designated.

Exemptions from disclosure, conforming to the Freedom of Information Act amended by Public Law 93-502 are set forth.

DISCUSSION OF MAJOR COMMENTS

Comments received in response to publication of the proposed revision of Part 103 in the Federal Register (44 FR 48709) have been carefully analyzed and are summarized below.

The majority of comments were concerned primarily with the protection of confidential business information. These comments were critical of section 103.14 which permits limited access to information on vessel manifests to both accredited members of the press, and to the public and allows the publication of certain of this information. Generally, privileged or confidential information contained in vessel manifests is exempt from disclosure under section 103.12. In this regard, commenters believed that competitors could glean from vessel manifests and summary statistical reports shipping methods, ports of entry, sources of supply, volume cost and selling price of goods, and determine market expectations and plans for new markets. Concerns were expressed that this private data, developed at a cost to a firm, would become publicly available. According to these commenters, competitors would thereby gain a substantial market advantage. The commenters conceive that if one information service published identifying data for a shipment plus its quantity, and a second service published the data for the same shipment plus its price, a subscriber to both services would obtain the combination of information which Customs would not release to either the press or public.

Criticism is also raised that section 103.14 permits selective disclosure inasmuch as accredited members of the press are allowed to examine vessel manifests which the general public may not.

It is the position of the Customs Service that the proposed regulation adequately balances the interests of the parties involved by generally exempting from disclosure privileged or confidential information contained in vessel manifests, while still insuring relative ease of publication of legally available information. As an added precaution, section 103.14(d) permits, upon written application, a shipper, consignee, or importer to request, that its name be withheld from public disclosure. In addition, under section 103.14(b), a press representative must submit to Customs for review any copy or notation made from a vessel manifest. Therefore, although the press may examine information not available to the public, the ability to copy such information or take notes of such information is severely limited by section 103.14.

It is pertinent to note that, on the other hand, certain comments received oppose the suspension of disclosure provision as currently written inasmuch as it does not require some factual determination of specific harm to be made.

Parenthetically, it also must be noted that that portion of Treasury Decision 81-19, published in the Federal Register on January 29, 1981 (46 FR 9567), relating to vessel manifest disclosure requirements, has been incorporated into this document as section 103.14.

One commenter recommended that section 103.15, which provides for sanctions against Customs officers and employees for improper disclosure to exporters and importers, be broadened to encompass all unauthorized disclosures. In response to this comment, the language of section 103.15 has been changed to invoke sanctions for unauthorized disclosures to any person not authorized by law or regulation to receive the disclosed information.

In reference to judicial review of an administrative action on an information request, one commenter noted that the authority formerly possessed by the Civil Service Commission to investigate certain withholdings has been transferred to the Special Counsel, Merit Systems Protection Board. (Section 906(a)(10) of the Civil Service Reform Act of 1978). In response, appropriate changes in section 103.9 have been made.

PROCEDURAL CHANGES

In accordance with a change in the internal procedures in Customs Headquarters, the proposed section on the maintenance of files and records, which invested the Director, Entry Procedures and Penalties Division, at Headquarters with the responsibility for maintaining files on information requests, has been deleted. Henceforth, information requests should be made at the Freedom of Information and Privacy Branch, Headquarters (section 103.5(d)), and

the appropriate division director at Headquarters shall make the initial determination to grant or deny a request for a record maintained in that particular division (section 103.6(a)(2)). Appeal of an initial determination shall no longer be made to the Assistant Commissioner of Customs, but rather to the Director, Office of Regulations and Rulings (section 103.7).

Pursuant to Executive Order 12188 (45 FR 69273), which transferred responsibility for the administration of antidumping and countervailing duty laws to the Secretary of Commerce, references to records on antidumping and countervailing duty in section 103.11 have been deleted.

INAPPLICABILITY OF REGULATORY FLEXIBILITY ACT

This document is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601-612) because the notice of proposed rulemaking on which the final rule is based was issued prior to January 1, 1981, the effective date of the Act.

DRAFTING INFORMATION

The principal authors of this document were Harold I. Loring and Todd J. Schneider, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

AMENDMENTS TO THE REGULATIONS

Parts 103, 152, and 175, Customs Regulations (19 CFR Parts 103, 152, 175), are amended as set forth below.

WILLIAM T. ARCHEY,
Acting Commissioner of Customs.

Approved: May 7, 1981.

JOHN P. SIMPSON,
Acting Assistant Secretary of the Treasury.

Part 103, Customs Regulations (19 CFR Part 103), is revised to read as follows:

PART 103—AVAILABILITY OF INFORMATION

SEC.

SEC.

Authority.—R.S. 251, as amended, sec. 624, 46 Stat. 759, sec. 501, 65 Stat. 290; 5 U.S.C. 301, 552, 19 U.S.C. 66, 1624, 31 U.S.C. 483a. Additional authority and statutes interpreted or applied are cited in the text or in parentheses following the sections affected.

§ 103.0 SCOPE.

This part contains regulations implementing the public information provisions of the Freedom of Information Act, as amended (5 U.S.C. 552). For the purpose of this part the Office of the Chief Counsel is considered to be a part of the United States Customs Service. The regulations supplement the regulations of the Department of the Treasury concerning public access to records, which are found in 31 CFR Part 1 and which are applicable to all constituent units of the Department, including the United States Customs Service. In the event of any inconsistency between these regulations and those of the Department of the Treasury, the Department of the Treasury regulations shall govern. Included in this part are the procedures by which the public may obtain access to records maintained by the United States Customs Service. The regulations provide a uniform schedule of fees for the search and duplication of Customs opinions and rulings, orders made in the adjudication of cases, and other Customs records and documents. In addition, the part includes provisions governing the release of certain information to the press and the giving of testimony or the production of Customs documents in court proceedings. Persons seeking information or records may find it useful to consult with either the Chief, Freedom of Information and

Privacy Branch, United States Customs Service, Washington, D.C. 20229, the Public Information Division at Headquarters, the appropriate regional commissioner of Customs, or the public information officer in the appropriate Customs regional office, before invoking the formal procedures set forth in this part.

§ 103.1 PUBLIC READING ROOMS.

Each office listed below will maintain a public reading room or public reading area where the material required to be made available under 5 U.S.C. 552(a)(2) and this part may be inspected and copied:

United States Customs Service [Headquarters], 1301 Constitution Avenue, N.W., Washington, D.C. 20229.
Region I—Boston, 100 Summer Street, Suite 1819, Boston, Massachusetts 02110.
Region II—New York, 6 World Trade Center, New York, New York, 10048.
Region III—Baltimore, U.S. Customhouse, 40 S. Gay Street, Baltimore, Maryland 21202.
Region IV—Miami, 99 S.E. 5th Street, Maimi, Florida 33131.
Region V—New Orleans, Canal-LaSalle Building, Suite 2400, 1440 Canal Street, New Orleans, Louisiana 70112.
Region VI—Houston, 500 Dallas Street, Suite 1240, Houston, Texas 77002.
Region VII—Los Angeles, New Federal Building, 300 N. Los Angeles Street, Los Angeles, California 90012.
Region VIII—San Francisco, 211 Main Street, Suite 1000, San Francisco, California 94105.
Region IX—Chicago, Room 1501, 55 East Monroe Street, Chicago, Illinois 60603.

The reading rooms are open to the public during regular business hours unless other hours are posted, Monday through Friday of each week, exclusive of national holidays. A fee for copies of requested material is charged in accordance with § 103.10.

§ 103.2 INFORMATION AVAILABLE TO THE PUBLIC.

(a) *General.* The Freedom of Information Act, as amended (5 U.S.C. 552), provides for access to information and records developed or maintained by Federal agencies. Subject only to the exemptions set forth in § 103.12, the public generally or any individual member is entitled to information or records which are described in paragraph (b) of this section and which are in the possession of the United States Customs Service. Access to that information is governed by the regulations in this part.

(b) *Three categories of information available.* Generally, 5 U.S.C. 552 divides agency information into three major categories and provides methods by which each category is available to the public. The three major categories, for which the disclosure requirements

of the United States Customs Service are set forth in this part, are as follows:

(1) Information required to be published in the Federal Register (see § 103.3).

(2) Information required to be made available for public inspection and copying or, in the alternative, to be published and offered for sale (see §103.4).

(3) Information required to be made available to any member of the public upon specific request (see § 103.5).

§ 103.3 PUBLICATION OF INFORMATION IN THE FEDERAL REGISTER.

(a) *Requirement.* Subject to the application of the exemptions described in §103.12 and subject to the limitations provided in paragraph (b) of this section, the United States Customs Service is required, by 5 U.S.C. 552(a)(1), to separately state, publish and keep current in the Federal Register for the guidance of the public the following information:

(1) Descriptions of its central and field organization and the established places at which, the persons from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions.

(2) A statement of the general course and method by which its function are channeled and determined, including the nature and requirements of all formal and informal procedures available.

(3) Rules of procedure, descriptions of forms available and the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations.

(4) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by it.

(5) Each amendment, revision, or repeal of matters referred to in subparagraphs (1) through (4) of this paragraph.

(b) *Limitations.*—(1) *Incorporation by reference in the Federal Register.* Matter reasonably available to an affected class of persons, whether published by a private organization or an agency of the United States, is published in the Federal Register for purposes of paragraph (a) of this section when it is incorporated by reference in the Federal Register with the approval of the Director of the Federal Register. Any matter which is incorporated by reference must be set forth in the privately- or publicly-printed document substantially in its entirety and not merely summarized or printed as a synopsis. There can be no incorporation by reference in the Federal Reigster of any matter where only a few persons having a special working knowledge of the activities of the United States Customs Service are familiar with its location and scope.

The provision of 5 U.S.C. 552(a)(1) and 1 CFR Part 20 control any incorporation of matter by reference.

(2) *Effect of failure to publish.* Except to the extent that a person has actual and timely notice of the terms of any matter referred to in paragraph (a) of this section which is required to be published in the Federal Register, that person is not required in any manner to resort to, or be adversely affected by, that matter if it is not published or incorporated by reference. That is, any matter which imposes an obligation and which is not published or incorporated by reference can not adversely change or affect a person's rights.

§ 103.4 PUBLIC INSPECTION AND COPYING.

(a) *In general.* Subject to the application of the exemption described in § 103.12 the United States Customs Service is required, by 5 U.S.C. 552(a)(2) and sections 174.32 and 177.10 of this chapter, to make available for public inspection and copying or, in the alternative, promptly publish and offer for sale, the following information:

(1) Final opinions and orders, including concurring or dissenting opinions, made in the adjudication of cases;

(2) Within 120 days of issuance, any precedential decision (including any ruling letter, internal advice memorandum, or protest review decision) issued under the Tariff Act of 1930, as amended, with respect to any Customs transaction;

(3) Those statements of policy and interpretations which have been adopted by the United States Customs Service but are not published in the Federal Register; and

(4) Administrative staff manuals and instructions to staff that affect a member of the public.

(b) *Indexes.* The United States Customs Service is required by 5 U.S.C. 552(a)(2) to maintain and make available for public inspection and copying those current indexes which identify any item described in paragraphs (a) (1) through (3) of this section that is issued, adopted, or promulgated after July 4, 1967, and that is required to be made available for public inspection or published. Unless the Commissioner determines by an order published in the Federal Register that publication is unnecessary and impracticable, these indexes are published on a quarterly or more frequent basis and are available for purchase at each of the public reading rooms listed in § 103.1, at a cost not to exceed the direct cost of duplication.

(c) *Effect of failure to publish or make available.* No matter, described in paragraphs (a) (1) through (3) of this section which is required by this section to be made available for public inspection or published, may be relied upon, used, or cited as precedent by the United States Customs Service against a party, other than an agency, unless that

party has actual and timely notice of such matter or unless the matter has been indexed and either made available for inspection or published, as provided by this section. This paragraph applies only to matters which have precedential significance and does not apply to matters which have been made available pursuant to § 103.3.

(d) *Deletion of identifying details.* To prevent an unwarranted invasion of personal privacy, in accordance with 5 U.S.C. 552(a)(2), identifying details contained in any matter described in paragraphs (a) (1) through (3) of this section are deleted before making that matter available for inspection or publication. However, in every case where identifying details are deleted, the basis for the deletion is explained in writing, giving specific reasons for the deletion and citing the applicable provision of 5 U.S.C. 552 and § 103.12, in an attachment to the document from which the identifying details have been deleted.

(e) *Public reading rooms.* The United States Customs Service has available for inspection and copying, in a reading room or otherwise the matters described in paragraphs (a) (1) through (3) of this section which are required by paragraph (a) to be made available for public inspection or published in the current indexes. Facilities are provided whereby a person may inspect and obtain copies of the material. There is no fee for access to materials, but a fee is charged in accordance with § 103.10 for a copy of any material provided.

§ 103.5 SPECIFIC REQUEST FOR RECORDS.

(a) *In general.* Except with respect to the records made available under §§ 103.3 and 103.4, but subject to the application of the exemptions described in § 103.12 the United States Customs Service is required, by 5 U.S.C. 552(a)(3), upon a request for reasonably-described records that conforms in every respect to the rules and procedures of this part, to make the requested records promptly available to the requester. A request or an appeal from the initial denial of a request which does not comply with the requirements set forth in this part is not subject to the time limits of §§ 103.6, 103.7, and 103.8 until amended so as to comply. Nevertheless, every reasonable effort will be made to answer each request within the applicable time limits or, if necessary, to promptly advise the requester in what respect the request or appeal is deficient so that it may be resubmitted or amended for consideration in accordance with this part. This section applies only to existing records which are in the possession or control of the United States Customs Service. There is no requirement that records be created or data be processed in other than the existing format in order to answer a request for records.

(b) *Requests for records not in control of the United States Customs Service*—(1) *Referral of request.* Where the request is for a record in the possession of, under the control of, or created by a constituent unit of the Department of the Treasury other than the United States Customs Service, the appropriate Customs officer shall transfer the request to the appropriate constituent unit and notify the requester of that transfer. Forwarding a request to another constituent unit is not a denial of access within the meaning of these regulations. If the United States Customs Service receives a request forwarded from another constituent unit of the Department of the Treasury, the time limits for response set forth in §§ 103.6(b) and 103.8(a) commence upon receipt of the request by the Freedom of Information and Privacy Branch, U.S. Customs Service. If the United States Customs Service receives a request for a record that is not in the possession or control of any constituent unit of the Department of the Treasury, the appropriate Customs officer shall return the request to the sender with an explanation of that fact.

(2) *Request for advice.* If the Customs Service has a copy of a requested unclassified record that was created by a Department or agency other than a constituent unit of the Department of the Treasury; the appropriate Customs officer shall ask that Department or agency for its advice on the release of the record. The appropriate Customs officer shall advise the other Department or agency that, in the absence of timely guidance from it, the United States Customs Service will proceed to make its own determination in accordance with this part. If it becomes necessary to respond to a requester because of the time limits set forth in §§ 103.6(b) and 103.8(a) without the advice of the other Department or agency, the appropriate Customs officer shall make the determination in accordance with this part and advise the requester accordingly. If the appropriate Customs officer denies access to the record under one of the exemptions set forth in § 103.12, that officer shall advise the requester of the right to appeal the denial and of the possibility of sending a request for the record directly to the originating Department or agency. If a requester appeals from a denial to the United States Customs Service, the appropriate Customs officer shall ask the originating Department or agency for timely advice on whether to release the records. Nevertheless, the ultimate decision on the appeal from a denial of access to a record rests with the Director, Office of Regulations and Rulings, as set forth in § 103.7.

(3) *Classified records.* If the Customs Service has a copy of a requested record created by a Department or agency other than a constituent unit of the Department of the Treasury, and that record is classified or contains both classified and unclassified material, the

request shall be referred to the originating Department or agency for a direct response. The requester shall be notified immediately of the referral. Such referral shall not constitute a denial of the request and no appeal rights accrue to the requester.

(c) *Form of request.* Although no standard form is prescribed for a request, in order to be subject to the provisions of this section and §§ 103.6 through 103.9, a request for records must—

(1) Be made in writing and signed by the person making that request;

(2) State that it is made pursuant to the Freedom of Information Act, as amended (5 U.S.C. 552), or these regulations, and have conspicuously printed on the face of the envelope the words "Freedom of Information Act Request" or "FOIA Request";

(3) Be addressed to the appropriate office or officer of the United States Customs Service, as set forth in paragraph (d) of this section;

(4) Reasonably describe the records in accordance with paragraph (e) of this section;

(5) Set forth the address where the person making the request desires to be notified of the determination as to whether the request will be granted;

(6) State whether the requester wishes to inspect the records or desires to have a copy made and furnished without first inspecting them; and

(7) State the firm agreement of the requester to pay the fees for search and duplication ultimately determined in accordance with §103.10, or request that such fees be reduced or waived and state the justification for such request (see § 103.10(d)).

Where the initial request, rather than stating a firm agreement to pay the fee ultimately determined in accordance with § 103.10, places an upper limit on the amount the requester agrees to pay and that upper limit is likely to be lower than the estimated fee, or where the requester asks for an estimate of the fees to be charged, or if the fees are expected to exceed $50, the appropriate Customs officer shall promptly advise the requester of the estimated fee due and ask the requester to agree to pay that amount. Where the initial request includes a request for reduction or waiver of fees, the appropriate Customs officer shall determine whether to grant the request for reduction or waiver in accordance with § 103.10(d) and notify the requester of the decision. If the officer decides to charge the requester for all or part of the fees normally due, the officer shall ask the requester to agree to pay the amount so determined. The requirements of this paragraph are not met until the requester agrees, in writing, to pay the fees applicable to the request for records, if any, or has made payment in advance of the fees estimated to be due.

(d) *To whom requests for records should be addressed.*

(1) *Headquarters.* Requests made by mail for records maintained at the Headquarters of the United States Customs Service should be addressed to "Freedom of Information Act Request," U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229. Requests may be delivered personally to the Freedom of Information and Privacy Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C.

(2) *Regional offices.* A person shall request records or information maintained in a field office of the United States Customs Service by either mailing or personally delivering the request to the regional commissioner of Customs of the region in which the field office is located. The addresses of the regional commissioners are listed in § 103.1.

(e) *Reasonable description of records.* A request for records must describe the records in reasonably sufficient detail to enable a Customs officer who is familiar with the subject area of the request to locate the records without placing an unreasonable burden upon the United States Customs Service. While no specific formula for a reasonable description of a record can be established, the requirement is usually satisfied if the requester gives the name, subject matter, and, if known, the date and location of the requested record. However, a requester should furnish any additional information which will more clearly identify the requested records. If a request does not reasonably describe the records being sought, the appropriate Customs officer shall ask the requester to refine the request. If necessary a requester may be granted a conference with knowledgeable Customs personnel. The requirement for a reasonable description is not a device for improperly withholding records from the public.

(f) *Date of receipt of request.* A request for records is considered to have been received for purposes of this part on the later of the dates on which—

(1) The requirements of paragraph (c) of this section have been satisfied; and, where applicable,

(2) The requester has agreed in writing, by executing a separate contract or otherwise, to pay the fees for search and duplication determined to be due in accordance with § 103.10; or

(3) The fees have been waived in accordance with § 103.10(d); or

(4) Payment in advance has been received from the requester.

A Customs officer or employee who receives a request for records and a separate agreement to pay, or a letter transmitting prepayment, or who issues a final notification of waiver of fees, shall stamp the date of receipt or dispatch by the responsible office on the material. The latest of those dates is the date of receipt of the request. As soon as

the date of receipt has been established, the appropriate Customs officer shall acknowledge receipt and inform the requester of the title of the Customs officer who is responsible for acting on the request.

(g) *Search for record requested.* Upon the receipt of a request, the appropriate Customs officer shall attempt to identify and locate the requested records. With respect to records maintained in computerized form, a search for a record includes services functionally analogous to searches for records which are maintained in a conventional form. However, Customs personnel are not required to tabulate or compile information for the purpose of creating a record. Only records in existence at the time of the receipt of the request will be treated as falling within the scope of the request and no request for the continuing production of documents created after receipt of the request will be honored.

(h) *"Request for record" defined.* For purposes of uniformity in record-keeping a "request for a record" is defined as a written request for a record of the U.S. Customs Service which has not been published in the Federal Register, the Customs Bulletin, by press release, or otherwise, or made available in a public reading room, or which has not previously been customarily furnished to requesters, whether or not the request makes reference to the Freedom of Information Act, as amended (5 U.S.C. 552).

103.6 GRANT OR DENIAL OF INITIAL REQUEST.

(a) *Officers designated to make initial determinations.*

(1) *Regional offices* The appropriate regional commissioner of Customs shall make any initial determination on a request for a record which is maintained in that region.

(2) *Headquarters.* For records located at Customs Service Headquarters, the initial determination to grant or deny a request shall be made by the appropriate Division Director at Customs Service Headquarters having custody of or functional jurisdiction over the subject matter of the requested records. In the event the request relates to records which are maintained in an office which is not within a division, the initial determination shall be made by the individual designated for that purpose by the Assistant Commissioner or Comptroller, as appropriate, having responsibility for that office.

(b) *Time limit for initial determinations.* The time limit for making an initial determination to grant or deny a request for records, including the time for notifying the requester of that determination, is 10 days (excepting Saturdays, Sundays, and legal public holidays) after the date of receipt of the request (see § 103.5(f)), unless the designated officer invokes an extension pursuant to § 103.8(a) or the requester otherwise agrees to an extension.

(c) *Grant of request.* If the appropriate Customs officer grants a request, and if the requester wants a copy of the requested records, that officer shall mail a copy of those records to the requester together with a statement of the fees for search and duplication at the time of the determination or promptly thereafter. If a requester wants to inspect the record, the appropriate Customs officer who grants the request shall send written notice to the requester stating the time and place of inspection and the amount of any fee involved in the request. In such a case, the appropriate Customs officer shall make the record available for inspection at the time and place stated, but in a manner so as not to interfere with its use by the United States Customs Service or to exclude other persons from making an inspection. In addition, reasonable limitations may be placed on the number of records which may be inspected by a person on any given date. The requester is not allowed to remove a record from the inspection room. If, after making inspection, the requester wants a copy of all or a portion of the requested record, the appropriate Customs officer shall supply the desired copy upon payment of the established fee prescribed in § 103.10.

(d) *Denial of request.* The Customs officer who denies a request for records (whether in whole or in part) shall mail written notice of the denial to the requester. The letter of notification shall contain (1) the physical location of the requested records, (2) the applicable exemption(s) and reason for not granting the request, (3) the name and title or position of the Customs officer who denied the request, (4) advice on the right to administrative appeal in accordance with § 103.7, and (5) the title and address of the Customs officer who is to decide any appeal.

(e) *Inability to locate records within time limits.* If a requested record cannot be located and evaluated within the initial 10-day period or the extension period allowed under § 103.8(a), the Customs officer who is responsible for the initial determination shall continue to search for the records. However, that officer shall also notify the requester of the facts and inform the requester that he or she may consider the notification to be a denial of access within the meaning of paragraph (d) of this section, and provide the requester with the address for the submission of an administrative appeal. The requester may also be invited, in the alternative, to agree to a voluntary extension of time in which to locate and evaluate the records. A voluntary extension of time does not waive a requester's right to appeal any ultimate denial of access or to appeal a failure to locate the records within the voluntary extension period.

§ 103.7 ADMINISTRATIVE APPEAL OF INITIAL DETERMINATION.

(a) *To whom appeals should be submitted.* A requester may submit an administrative appeal to the Director, Office of Regulations and Rulings, within 35 days after the date of notification described in § 103.6 or the date of the letter transmitting the last records released, whichever is later. A requester shall mail or personally deliver an appeal to the United States Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

(b) *Form of appeal.* The Administrative appeal shall—

(1) Be in writing and signed by the requester;

(2) Have conspicuously printed on the face of the envelope the words "Freedom of Information Act Appeal";

(3) Reasonably describe, in accordance with § 103.5(e), the records to which the appeal relates;

(4) Set forth the address where the requester desires to be notified of the determination on appeal;

(5) Specify the date of the initial request and the date and control number of the letter denying the initial request; and

(6) Petition the Director, Office of Regulations and Rulings, to grant the request for records and state any arguments in support thereof.

(c) *Disposition of appeal.* The Customs officer or employee who receives an appeal shall stamp the date of receipt on the appeal and the stamped date is the date of receipt for purposes of the appeal. The Director, Office of Regulations and Rulings, shall acknowledge and advise the appellant of the date of receipt and of the date that a response is due under this paragraph. The Director shall affirm the initial denial (in whole or in part) or grant the request for records and notify the appellant of that determination by letter mailed within 20 days (exclusive of Saturdays, Sundays, and legal public holidays) after the date of receipt of the appeal, unless extended pursuant to § 103.8(a). The purpose of the letter of denial is to inform the appellant of the reason for the denial and the right to judicial review of that denial under 5 U.S.C. 552(a)(4)(B). If the Director is unable to act on an appeal within the 20-day period (or any extension thereof pursuant to § 103.8(a)), the Director shall send written notice of that fact to the appellant. In those circumstances, an appellant is entitled to commence an action in a district court as provided in § 103.9 despite any continuation in the processing of an appeal. However, the appellant may also be invited, in the alternative, to agree to a voluntary extension of time in which to decide the appeal. A voluntary extension does not waive the right of the appellant to ultimately commence an action in a United States district court on the appellant's request.

§ 103.8 TIME EXTENSIONS.

(a) *Ten-day extension.* In unusual circumstances, the Customs Officer who is responsible for deciding an initial request or an appeal may extend the time limitations set in §§ 103.6 and 103.7 after written notice to the requester or appellant. This notice must state the reason for the extension and the date on which the determination is expected to be dispatched. Any extension or extensions of time are limited to a cumulative total of not more than 10 additional working days. (For example, if an extension pursuant to this paragraph is invoked in connection with an initial determination, any unused days of the extension period may be invoked in connection with the determination on administrative appeal by written notice from the Director, Office of Regulations and Rulings, who is to make the appellate determination. If no extension is sought for the initial determination, and extension of 10 days may be added to the ordinary 20-day period for appellant review.) Generally, extensions will be invoked only to the extent reasonably necessary to properly respond to a request. As used in this paragraph, "unusal circumstances" means at least one of the following:

(1) The need to search for and collect the requested records from field facilities or other establishments in buildings other than the building in which the office of the Customs officer to whom the request is made is located.

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request.

(3) The need for consultation, which shall be conducted with all practicable speed, with another Department or agency having a substanital interest in the determination of the request, among two or more constituent units within Department of the Treasury, or within the United States Customs Service (other than the legal staff or Public Affairs Division) having substantial subject-matter interest therein. Consultations with personnel of the Department of Justice concerned with requests for records under thc Freedom of Information Act, as amended (5 U.S.C. 552), do not constitute a basis for an extension under this subparagraph.

(b) *Extension by judicial review.* If the United States Customs Service fails to comply with the time limitations specified in §§ 103.6 and 103.7 and the requester commences an action under § 103.9, the court in which the suit was initiated may retain jurisdiction and allow the United States Customs Service additional time to review its records, if the Customs Service shows the existence of exceptional circumstances and the exercise of due diligence in responding to the request.

§103.9 JUDICIAL REVIEW.

(a) *Failure to comply with time limitations.* If the United States Customs Service fails to comply with the time limitations specified in §§103.6, 103.7 or 103.8, a requester is considered to have exhausted the administrative remedies with respect to the request.

(b) *Procedure of initiating judicial review.* If a request for records is denied upon appeal pursuant to §103.7, or if no determination is made within the 10-day or 20-day periods specified in §§103.6 and 103.7, respectively, together with an extension pursuant to §103.8(a) or by agreement of the requester, the requester may commence an action under 5 U.S.C. 552(a)(4)(B) in a United States district court in the district (1) in which the requester resides, (2) in which the requester's principal place of business is located, (3) in which the records are situated, or (4) in the District of Columbia. Service of process in that action is governed by the Federal Rules of Civil Procedure (28 U.S.C. App.) applicable to actions against an agency of the United States. The Chief Counsel, United States Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 is the officer designated to receive any service of process.

(c) *Proceeding against officer or employee.* Under 5 U.S.C. 552(a)(4)(F), the Special Counsel, Merit Systems Protection Board, has authority, upon the issuance of a written finding by a court that the Customs officer or employee who was primarily responsible for withholding a record may have acted arbitrarily or capriciously, to initiate a proceeding to determine whether disciplinary action is warranted against that officer or employee. The Special Counsel, after investigation and consideration of the evidence submitted, submits its findings and recommendations to the Commissioner of Customs and the Secretary of the Treasury. The Special Counsel also sends copies of the findings and recommendations to the officer or employee or the representative of that officer or employee.

§103.10 FEES FOR SERVICES.

(a) *In general.* (1) The fees prescribed in this section are for search and duplication and under no circumstances is there a fee for determining whether an exemption can or should be asserted, for deleting exempt matter being withheld from records to be furnished, or for monitoring a requester's inspection of records made available in this manner.

(2) Customs publications which are available for sale through the Government Printing Office are on the shelves of the reading rooms and similar public inspection facilities, but those publications are not available for sale at those facilities. Those publications may be purchased from the Superintendent of Documents, U.S. Government

Printing Office, Washington, D.C. 20402. However, pages from those publications may be copied at the public inspection facilities in accordance with the schedule of fees set forth in paragraph (g) of this section.

(b) *When charged.* Unless charges are inapplicable, or are waived or reduced in accordance with paragraph (c) or (d) of this section, fees are charged in accordance with the schedule contained in paragraph (g) of this section for services rendered in responding to requests for records.

(c) *Services performed without charge*—(1) *Certain classes of records.* The Commissioner of Customs or any of the Commissioner's designees may determine, under the rulemaking procedures of 5 U.S.C. 553, which classes or records under their control may be provided to the public without charge, or at a reduced charge.

(2) *Records provided to government units.* Normally, in accordance with paragraph (d)(2)(ii) of this section, no charge is made for providing records to Federal, State, or foreign governments, international governmental organizations, or local governmental agencies or offices.

(d) *Waiver or reduction of fees*—(1) *Records unavailable or exempt.* Fees may be waived or reduced at the discretion of the Customs officer who determines the availability of records, if the record is not found or is exempt from disclosure.

(2) *Request for waiver or reduction of fees.* Fees may be waived or reduced on a case by case basis in accordance with this paragraph by the Customs officer who determines whether to release the record. A request for a waiver or reduction of fees must be in writing. The appropriate Customs officer shall waive or reduce a fee if the officer determines either that—

(i) The records are being requested by, or on behalf of, an individual who in writing, under penalty of perjury, demonstrates indigency to the satisfaction of the officer and that compliance with the request does not constitute an unreasonable burden on the United States Customs Service; or

(ii) A waiver or reduction of the fees is in the public interest because furnishing the information primarily benefits the general public.

(3) *Appeal from denial of request.* An appeal from a denial of a request for waiver or reduction of fees is decided under the criteria set forth in subparagraph (2) of this paragraph by the Director, Office of Regulations and Rulings. An appeal shall be in writing and mailed to the Director within 35 days of the denial of the initial request for waiver or reduction. An appeal under this paragraph is entitled to a prompt decision.

(e) *Avoidance of unexpected fees.* In order to protect a requester from unexpected fees, a requester is required to state in the request an agreement to pay the fees determined in accordance with paragraph (g) of this section or to state an acceptable upper limit on the cost of processing the request. If the fee for processing the request is estimated to exceed that limit, or if the requester has failed to state a limit and the cost is estimated to exceed $50 and there is no decision to waive or reduce the fees, the appropriate Customs officer shall—

(1) Inform the requester of the estimated costs;

(2) Extend an offer to the requester to confer with Customs personnel in an attempt to reformulate the request in a manner which will reduce the fee and still meet the needs of the requester; and

(3) Inform the requester that the running of the time period within which a determination on the request must be made is suspended until the request is reformulated in manner to reduce the cost or until the requester pays or agrees to pay the estimated cost.

(f) *Form of payment.* (1) A requester shall pay by a check or money order that is payable to the order of the United States Customs Service.

(2) If the estimated cost exceeds $50, the requester may be required to enter into a contract for the payment of actual costs, as determined in accordance with paragraph (g) of this section, which contract may provide for prepayment of the estimated costs in whole or in part.

(g) *Amount to be charged for specified services.* A fee for a service performed is imposed and collected as set forth in this paragraph. The Commissioner of Customs or the Commissioner's designee may set an appropriate fee for any service not described below. These extraordinary fees are imposed and collected pursuant to 31 U.S.C. 483a, subject to the constraints imposed by 5 U.S.C. 552(a)(4)(A).

(1) *Duplication.* (i) The charge for photocopies per page up to 8½″ x 14″ is at the rate of $0.10 each, except that no charge is imposed for copying 10 pages or less when less than one hour is spent in locating the records requested.

(ii) The charge for photographs, films and other materials is their actual cost. The United States Customs Service may furnish the records to be released to a private contractor for copying and charge the person requesting the records the actual cost of duplication charged by the private contractor. No fee is charged where the requester furnishes the supplies and equipment and makes the copies at the Government location.

(2) *Unpriced printed materials.* The charge for unpriced printed material, which is available at the location where requested and

which does not require duplication for copies to be furnished, is at the rate of $0.25 for each twenty-five pages or fraction thereof.

(3) *Search services.* The charge for services of personnel involved in locating records is $5 for each hour or fraction thereof, except that no charge is imposed for a search of less than one hour. Where a computer search is required because of the nature of the records sought and the manner in which such records are stored, the fee is $5 for each hour or fraction thereof of personnel time associated with the search plus the actual cost of extracting the stored information in the format in which it is normally produced. This actual cost of extracting information is based on computer time and supplies necessary to comply with the request.

(4) *Searches requiring travel or transportation.* The charge for transporting a record from one location to another, or for transporting a Customs officer or employee to the site of requested records when it is necessary to locate rather than examine the records, is the actual cost of the transportation.

§103.11 SPECIFIC CUSTOMS SERVICE RECORDS SUBJECT TO DISCLOSURE.

(a) *Administrative staff manuals and instructions.* Except as exempted by §103.12, all administrative staff manuals and instructions to staff that affect any member of the public, and indexes thereto, are available for public inspection and copying in the United States Customs Service public reference facilities (see § 103.1), including the following:

Catalogue of Customs Forms.
Computer printout of precedent cases decided by the Office of Regulations and Rulings, Headquarters, United States Customs Service.
Customs Information Exchange Rulings and Rulings issued by the Office of Regulations and Rulings organized chronologically by year, with identifying data deleted pursuant to §§ 103.12 and 103.14.
Customs Simplification Act (C.S.A.) Series Letters and Index (identifying information deleted pursuant to §§103.12 and 103.14).
Customs Statistical Manual.
Import Requirements on Articles Assembled Abroad from U.S. Components (Item 807.00, TSUS).
KWIC Index of United States Customs Service circulars letters, and supplementary monthly checklists.
Synopsis of Decisions of the Duty Assessment Process.

(b) *Other Customs records.* In general, all other documents issued by the Secretary of the Treasury, the Commissioner of Customs, or other officers of the Department of the Treasury or of the United States Customs Service in matters administered by the United States Customs Service, if reasonably described, and unless exempted from

disclosure under §103.12, are available. The classes of records of the United States Customs Service which may be made available under this paragraph upon written request submitted in accordance with the §103.5 include, but are not limited to the following:

(1) Records relating to—(i) Comments submitted by private parties (which are not considered to include foreign governments) in response to a published notice of proposed rulemaking and of proposed changes in tariff classification, unless the submitter states that the information is privileged or confidential, giving reasons therefor, and the Commissioner of Customs agrees that the information contained therein is exempt from disclosure under §103.12;

(ii) Advisory committees on Customs matters;

(iii) Rosters of licensed customhouse brokers;

(iv) Names of individual licensed customhouse brokers;

(v) Names and titles of all Customs personnel;

(vi) Performance awards;

(vii) Suggestion awards;

(viii) The administration of and decisions concerning import quotas; and

(ix) Customs laboratory methods.

(2) Decisions concerning—(i) Matters arising under the Tariff Schedules of the United States (19 U.S.C. 1202);

(ii) Whether or not specific items, articles, or merchandise qualify for entry under the Fair Trade Act of 1959 (19 U.S.C. 1751 *et seq.*), and the disposition of articles previously entered under the Fair Trade Act; Customs participation and assistance at Trade Fairs;

(iii) The dutiable status of gifts pursuant to section 321, Tariff Act of 1930, as amended (19 U.S.C. 1321);

(iv) The eligibility of vehicles used in international traffic pursuant to section 332(a), Tariff Act of 1930 (19 U.S.C. 1322(a)), and other instruments of international traffic generally for duty-free entry;

(v) Prohibition from entry of merchandise produced by convict, forced, or indentured labor (19 U.S.C. 1307);

(vi) The entry or valuation of merchandise;

(vii) Liens in cases arising under section 564, Tariff Act of 1930, as amended (19 U.S.C. 1564);

(viii) Bills of lading, carriers' certificates, or rights in respect of merchandise, cases arising under section 483 or 484 (c), (h), or (i), Tariff Act of 1930, as amended (19 U.S.C. 1483, 1484 (c), (h), (i));

(ix) Trademarks, trade names, copyrights, patents, and related matters;

(x) Country of origin marking requirements of section 304, Tariff Act of 1930, as amended (19 U.S.C. 1304);

(xi) Psittacine or other birds, bird feathers, bird skins, monkeys, dogs, cats, and other animals and pets prohibited entry or subject to restrictions and controls on entry;

(xii) Entry of articles admitted temporarily free of duty under bond as provided in schedule 8, part 5C, Tariff Schedules of the United States (19 U.S.C. 1202), and entry of articles admitted temporarily free of duty under A.T.A. Carnets, as provided in § 114.22 (a) and (b) of this chapter;

(xiii) Tonnage taxes (regular, special, and discriminatory) and light money;

(xiv) The entry, clearance, and use of vessels and permits for them to proceed coastwise;

(xv) The regulation of vessels in the foreign, coastal, fishing, and other trades of the United States;

(xvi) The limitation of the use of foreign vessels in waters under the jurisdiction of the United States;

(xvii) Salvage operations by vessels within the territorial waters of the United States (46 U.S.C. 316);

(xviii) The assessment and collection of duties on equipment or repairs of vessels or aircraft under section 466, Tariff Act of 1930, as amemded (19 U.S.C. 1466), and the remission or refund of such duties;

(xix) Requirements for entry, clearance, and use of aircraft;

(xx) The arrival or departure and the use of motor vehicles, railway trains, or other vehicles;

(xxi) Adequacy of premises at Customs bonded warehouses and control of the merchandise stored therein;

(xxii) Use of protective Customs seals and labels; and

(xxiii) The itineraries of foreign vessels which had been submitted for an advisory ruling to determine whether the primary object of a contemplated voyage would be considered to unlawful coastwise trade (see § 4.80a(d) of this chapter).

§ 103.12 EXEMPTIONS.

Pursuant to 5 U.S.C. 552(b), the disclosure requirements of 5 U.S.C. 552(a) are not applicable to U.S. Customs Service records which relate to the following:

(a) *Matters kept secret pursuant to Executive Order.* Matters specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and which are, in fact, properly classified pursuant to such Executive Order (see 31 CFR Part 2).

(b) *Certain internal rules and procedures.* Information relating solely to the internal personnel rules and practices of an agency.

(c) *Matters exempt from disclosure by statute.* Information specifically exempted from disclosure by statute (other than 5 U.S.C. 552b), if the statute (1) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (2) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

(d) *Privileged or confidential information.* Trade secrets and commercial or financial information obtained from any person which is privileged or confidential.

(e) *Certain inter-agency or intra-agency correspondence.* Inter-agency or intra-agency memoranda or letters which would not be available by law to a private party in litigation with the agency.

(f) *Material involving personal privacy.* Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(g) *Certain investigatory records.* Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would—

(1) Interfere with enforcement proceedings;

(2) Deprive a person of a right to a fair trial or an impartial adjudication;

(3) Constitute an unwarranted invasion of personal privacy;

(4) Disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source;

(5) Disclose investigative techniques and procedures; or

(6) Endanger the life or physical security of law enforcement personnel.

§ 103.13 SEGREGABILITY OF RECORDS.

(a) *Reasonably segregable portions.* Where the record requested contains information which is exempt from disclosure under 5 U.S.C. 552(b) and section 103.12, the reasonably segregable portions of the record shall be made available to the requester. For purposes of this section, the term "reasonably segregable portions" means those portions of the record: (1) which are not exempt from disclosure by 5 U.S.C. 552(b) and section 103.12; (2) which, after deletion of the exempt material, still convey meaningful and nonmisleading information; and (3) from which it can reasonably be assumed that a skillful and knowledgeable person could not reconstruct the exempt portions.

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(b) *Petitions by American manufacturers, producers, or wholesalers.* Identifying data is not to be deleted from petitions filed by American manufacturers, producers, and wholesalers pursuant to section 516, Tariff Act of 1930, as amended (19 U.S.C. 1516). See Part 175 of this chapter.

§ 103.14 INFORMATION ON VESSEL MANIFESTS AND SUMMARY STATISTICAL REPORTS.

(a) *Disclosure to members of the press.* Although the following classes of information are exempt from the requirement of disclosure under the provisions of § 103.12, accredited representatives of the press, including newspapers, commercial magazines, trade journals, and similar publications may be permitted to examine vessel manifests and summary statistical reports of imports and exports and to copy therefrom for publication information and data not of a confidential nature, subject to the following rules:

(1) Of the information and data appearing on outward manifests, only the name and address of the shipper, general character of the cargo, number of packages and gross weight, name of vessel or carrier, port of exit, port of destination, and country of destination may be copied and published. However, if the Secretary of the Treasury makes an affirmative finding on a shipment-by-shipment basis that disclosure of the above information is likely to pose a threat of personal injury or property damage, that information shall not be disclosed to the public.

(2) Commercial or financial information, such as the names of the consignees, and marks and numbers shall not be copied from outward manifests or any other papers.

(3) Of the information shown on inward manifests, only the name of the consignee, the general character of the commodity, the quantity (or value), name of vessel, and the country of dispatch shall be copied and published. When an inward manifest shows both quantity and value of the commodity, either may be copied and published, but not both in any instance.

(b) *Review of data.* All copies and notations from inward or outward manifests shall be submitted for examination by a Customs officer designated for that purpose.

(c) *Disclosure to the public.* Members of the public shall be permitted to obtain information from, but not examine, vessel manifests, subject to the rules set forth in paragraphs (a) and (b) of this section. However, importers and exporters or their duly authorized brokers, attorneys, or agents may be permitted to examine manifests with respect to any consignment of goods in which they have a proper and legal interest as principal or agent, but shall not be permitted

to make any general examination of manifests or make any copies or notations from them except with reference to the particular importation or exportation in which they have a proper and legal interest.

(d) *Suspension of disclosure.* (1) Inward manifest. Except as provided in § 103.17, upon written application of a consignee or importer, access to the name of such consignee or importer, on an inward manifest will thereafter be refused.

(2) Outward manifest. If a shipper wishes to request confidential treatment by Customs of the shipper's name and address contained in an outward manifest, the following procedure shall be followed:

(i) A shipper, or authorized employee or official of the shipper, must submit a certification claiming confidential treatment of the shipper's name and address. The certification shall include the shipper's Internal Revenue Service Employer Number, if available.

(ii) There is no prescribed format for a certification.

(iii) The certification must be submitted to the Regional Commissioner for the Region in which the port of exportation is located.

(iv) Each certification will be valid for a period of two (2) years from the date of its submission to Customs.

(3) If any individual shall abuse the privilege granted him of examining inward and outward manifests or shall make any improper use of any information or data obtained from such manifests or other papers filed in the customhouse, both he and the party or publication which he represents shall thereafter be denied access to such papers.

§ 103.15 Sanctions for improper actions by Customs officers or employees.

(a) The improper disclosure of the confidential information contained in Customs documents, or the disclosure of information relative to the business of one importer or exporter that is acquired by a Customs officer or employee in an official capacity to any person not authorized by law or regulations to receive this information is a ground for dismissal from the United States Customs Service, suspension, or other disciplinary action, and if done for a valuable consideration subjects that person to criminal prosecution.

(b) Sanctions for improper denials of information by Customs officers or employees are set forth in § 103.9(c).

§ 103.16 Information concerning fines, penalties, and forfeitures cases.

Except as otherwise provided in these regulations or in other directives (including those published as Treasury Decisions), district

directors of Customs and other Customs officers shall refrain from disclosing facts concerning seizures, investigations, and other pending cases until Customs action is completed. After the penalty proceeding is closed by payment of the claim amount, payment of a mitigated amount, or judicial action, the identity of the violator, the section of the law violated, the amount of penalty assessed, loss of revenue, mitigated amount (if applicable), and the amount of money paid may be disclosed to the public by the appropriate district director of Customs. Public disclosure of any other item of information concerning such cases, whether open or closed, shall only be made in conformance with the procedures provided in § 103.5.

§ 103.17 TESTIMONY OR THE PRODUCTION OF DOCUMENTS IN COURT.

(a) *General.* In answer to a legal process or demand from a court issued on behalf of the United States or an officer thereof, Customs officers or employees shall produce in court, and may testify with respect to, any official Customs papers or documents demanded which are in Customs custody. When the process or demand is issued on behalf of a party other than the United States, Customs officers or employees shall produce in court, and may testify with respect to, those papers and documents, but only to the extent that the party on whose behalf the papers or documents are demanded is permitted under these regulations to inspect or copy those papers or documents. An exception to the above two rules may be made only on the written order of the Commissioner of Customs or the Commissioner's designee. When requested, copies may be authenticated pursuant to the provisions of section 1733, title 28, United States Code.

(b) *Request of Customs Court.* Except as stated in § 103.12, nothing in this part precludes Customs officers or employees from producing in the United States Customs Court, any Customs papers or documents, in Customs custody, or from testifying or otherwise rendering all proper assistance to the court in proceedings before it when request therefor is made by the court; nor from furnishing to counsel for the United States information in, and permitting inspection of, Customs papers and documents requested by such counsel, nor from testifying on behalf of the United States or otherwise assisting such counsel in the performance of official duties.

(c) *Subpoena or subpoena duces tecum.* Upon being served with a subpoena or subpoena duces tecum from a court or court officer calling for testimony or the production of papers or documents in cases not covered by paragraph (a) or (b) of this section, or in cases where the testimony or documents desired would disclose matters the disclosure of which would be contrary to these regulations, the Customs officer involved shall refer the matter to Headquarters for in-

structions, with a report that specifically describes the testimony or documents desired. The Customs officer involved shall include in that report his or her opinion on whether the giving of the testimony or the furnishing of the documents would disclose information not permitted to be disclosed under these regulations. That officer also shall state in what particulars, if any, the disclosure of the information and work incidental to that disclosure would interfere with the orderly conduct of Customs business. If instructions are not received prior to the date set for appearance or production of documents, or if the Commissioner of Customs or the Commissioner's designee declines to permit their production or the disclosure of the information contained therein or otherwise within the knowledge of the Customs officer or employee whose testimony is requested, the Customs officer or employee shall appear in court or before the officer concerned in answer to the subpoena and respectfully decline to produce the documents called for or to testify, except to the extent specifically authorized elsewhere in this section, citing this regulation as authority for the refusal. If the matter has not already been referred to Headquarters for instructions, the Customs officer or employee shall advise the court or officer that it will be so referred.

(d) *In camera inspection of records.* Nothing in this section authorizes Customs officers or employees to withhold records from a court, pursuant to its order, for *in camera* inspection to determine the propriety of claimed exemptions to disclosure.

(R.S. 251, as amended, sec. 624, 46 Stat. 759 (5 U.S.C. 301; 19 U.S.C. 66, 1624))

PART 152—CLASSIFICATION AND APPRAISEMENT OF MERCHANDISE

§ 152.42 [AMENDED]

Section 152.42(b) of the Customs Regulations (19 CFR 152.42(b)) is amended by substituting "103.12(d)" for "103.7(d)" in the last sentence.

(R.S. 251, as amended, sec. 624, 46 Stat. 759 (19 U.S.C. 66, 1624))

PART 175—PETITIONS BY AMERICAN MANUFACTURERS, PRODUCERS, AND WHOLESALERS

§ 175.21 [AMENDED]

Section 175.21(b) of the Customs Regulations (19 CFR 175.21(b)) is amended by substituting "103.11(b)" for "103.8(b)" and by substituting "103.12(d)" for "103.10".

(R.S. 251, as amended, sec. 624, 46 Stat. 759 (19 U.S.C. 66, 1624))

Parallel Reference Table

(THIS TABLE SHOWS THE RELATION OF SECTIONS IN NEW PART 103 TO 19 CFR PART 103)

Proposed section	*19 CFR section*
103.0	103.0.
103.1	103.1.
103.2(a)	New.
103.2(b)	New.
103.3(a)	New.
103.3(b)	New.
103.4(a)	New.
103.4(b)	New.
103.4(c)	New.
103.4(d)	103.4(b) New.
103.4(e)	New.
103.5(a)	103.2 (b), (c), and (d) New.
103.5(b)	103.2(e) New.
103.5(c)	103.2 (b) and (c) New.
103.5(d)	103.2 (a) New.
103.5(e)	103.2 (d) New.
103.5(f)	New.
103.5(g)	New.
103.5(h)	103.6(c).
103.6(a)	103.2(f), 103.3(a).
103.6(b)	New.
103.6(c)	New.
103.6(d)	New.
103.6(e)	103.4(d) New.
103.7(a)	103.5(a) New.
103.7(b)	New.
103.7(c)	103.5 (b) and (c) New.
103.8(a)	New.
103.8(b)	New.
103.9(a)	New.
103.9(b)	103.4(c)(2) New.
103.9(c)	New.
103.10(a)	New.
103.10(b)	103.9(b) New.
103.10(c)	103.9(c) New.
103.10(d)	New.
103.10(e)	New.
103.10(f)	New.

Proposed section	*19 CFR section*
103.10(g)	103.9(b) New.
103.11(a)	103.7.
103.11(b)	103.8 (a) and (b).
103.12(a)	103.10(a) New.
103.12(b)	103.10(b) New.
103.12(c)	New.
103.12(d)	103.10(d).
103.12(e)	103.10(e).
103.12(f)	103.10(f).
103.12(g)	103.10(g) New.
103.13(a)	New.
103.13(b)	New.
103.14(a)	103.11(a).
103.14(b)	103.11(b).
103.14(c)	103.11(c).
103.14(d)	103.11(d).
103.15(a)	103.12.
103.15(b)	New.
103.16	103.13.
103.17(a)	103.14(a).
103.17(b)	103.14(b).
103.17(c)	103.14(c).
103.17(d)	New.

Parallel Reference Table

(THIS TABLE SHOWS THE RELATION OF THE OLD SECTIONS TO THE NEW SECTIONS IN PART 103)

Old	*New*
103.0	103.0.
103.1	103.1.
103.2(a)	103.5(d); 103.6(a).
103.2 (b)-(d)	103.5 (a), (c), (e).
103.2(e)	103.5(b).
103.2(f)	103.6(a).
103.4(b)	103.4(d).
103.4(c)(2)	103.9(b).
103.4(d)	103.6(e).
103.5(a)	103.7(a).
103.5 (b), (c)	103.7(c).
103.6 (a), (b)	Deleted.
103.6(c)	103.5(h).
103.7	103.11(a).

Old	*New*
103.8 (a), (b)	103.11(b).
103.9(b)	103.10(b); 103.10(g).
103.9(c)	103.10(c).
103.10(a)	103.12(a).
103.10(b)	103.12(b).
103.10(d)	103.12(d).
103.10(e)	103.12(e).
103.10(f)	103.12(f).
103.10(g)	103.12(g).
103.11(a)	103.14(a).
103.11(b)	103.14(b).
103.11(c)	103.14(c).
103.11(d)	103.14(d).
103.12	103.15(a).
103.13	103.16.
103.14 (a)-(c)	103.17 (a)-(c).

United States Court of International Trade

Decisions of the United States Court of International Trade

(Slip Op. 81–66)

H. E. LAUFFER, CO., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 74–4–00885–S

Articles Chiefly Used for Preparing, Serving, or Storing Food or Beverages or Food or Beverage Ingredients, of Fine-grained Earthenware or Fine-grained Stoneware

[Judgment for Plaintiff]

(Decided July 22, 1981)

Murray Sklaroff for the plaintiff.

Stuart E. Schiffer, Acting-Assistant Attorney General; *Jospeh I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Susan Handler-Menahem* on the brief), for the defendant.

RAO, *Judge:* This case involves merchandise imported at New York in 1972 and 1973, consisting of articles described on the commercial invoices as "Anenome," "Karelia," "Rosemarin," "Saara," "Kosmos Brown," "Ruska," "Valencia" and "Oliivi."

The merchandise was classified as articles chiefly used for preparing, serving, or storing food or beverages, or food or beverage ingredients, of nonbone chinaware or of subporcelain, available in specified sets having an aggregate value of over $10 but not over $24 in item 533.65, TSUS as amended; or available in specified sets having an aggregate value of over $24 but not over $56 in item 533.66, TSUS, as amended.

The parties have stipulated that if this court has jurisdiction over this action, the merchandise is properly classifiable as articles chiefly used for preparing, serving, or storing food or beverages, or food or beverage ingredients, of fine-grained earthenware or fine-grained stoneware available in specified sets having an aggregate value of over $7 but not over $12 in item 533.26, TSUS, as amended, or available in specified sets having an aggregate value of over $12 in item 533.28, TSUS, as amended.

The jurisdictional question arises as a consequence of plaintiff's having filed two protests against the merchandise in three entries (entries 450637, 356439 and 304891). Entry 472635, also involved herein, is not the subject of a dual protest.

Pursuant to 19 U.S.C. § 1514(b)(1) [as in effect at the time of these entries] "only one protest may be filed for each entry of merchandise, except that where the entry covers merchandise of different categories, a separate protest may be filed for each category." The United States Court of International Trade [the U.S. Customs Court at the time this action was commenced] does not have jurisdiction of any action unless a protest has been filed as prescribed by section 514 of the Tariff Act of 1930, as amended [19 U.S.C. § 1514 (1976)]. 28 U.S.C. § 1582(c) (1976).

The sole issue before this court, therefore, is whether merchandise classifiable as articles used for food preparation, serving or storage of fine-grained earthenware or stoneware available in specified sets having an aggregate value between $7 and $12 and merchandise of the same composition and use but having an aggregate value of more than $12 per specified set is "of different categories."

The merchandise is "of different categories" and this court, accordingly, has jurisdiction in this case.

The word "category" is defined in *Webster's New Collegiate Dictionary*, C. & C. Merriam Co., 1973, as follows:

> 1 c: one of the fundamental or ultimate classes of entities or of language

2: a division within a system of classification.

It is also defined in *Webster's New International Dictionary of the English Language*, 2nd ed. (1956), as:

> 2. A class to which a certain assertion applies; a class or division formed by the nature of the considerations entertained or for the purposes of a given discussion or classification; * * * (see classification).

The Tariff Schedules themselves speak of "all articles imported into the customs territory of the United States" [general headnote 1, TSUS], the broadest category of merchandise for purposes of imposing tariffs, and very specific categories of merchandise; e.g. vegetables, reduced to flour, garlic, in item 140.60, TSUS. Therefore the merchandise in this action is of different categories, because it has different values, that is, the merchandise with a value between $7 and $12 is different from the merchandise of the same type but with a value of over $12.

The *Tariff Classification Study Explanatory and Background Materials*, Schedule 5 at page 86, discusses items 533.23, –.25 and –.27 (item 533.27 is encompassed in 533.26 and 533.28, effective January 1, 1968), and states:

> The existing "value-bracket" tariff descriptions for plates, cups, saucers and other articles adopted as a result of the trade-agreement concessions were aimed at separating tableware into three quality grades each of which would bear the same rate for all articles in the grade.* * *

This evidences a Congressional intent that tableware of different grades would be considered separately, that is, to be of different categories, based on differences in quality.

In the United States Tariff Commission's (now the United States International Trade Commission) *Summaries of Trade and Tariff Information*, Schedule 5, Volume 3 (1971), at page 102, it is stated that for tariff purposes, ware "available in specified sets (items 533.23, –.25, –.26, –.28) is considered dinnerware." In discussing United States imports of dinnerware the Tariff Commission stated at page 107:

> Dinnerware having a unit value of over $7 per 77-piece norm, which accounted for about 95 percent of the quantity of dinnerware imported during 1966–70, increased irregularly from 5.5 million dozen pieces, valued at $12.8 million in 1966 to 6.8 million dozen pieces, valued at $20.4 million in 1970. The United Kingdom and Japan together supplied most of the imported dinnerware valued over $7 per norm, while Japan alone supplied most of the ware valued at less that (sic) $7 per norm. [Footnote and table ommitted.]

While the *Summaries of Trade and Tariff Information* are not legislative history for the tariff schedules, having been promulgated subsequent to the enactment of the tariff schedules, the *Summaries* are indicia of Congressional intent. *American Bristle & Hair Drawing Co. et al.* v. *United States*, 59 CCPA 104, C.A.D. 1048, 458 F. 2d 524 (1972). The quoted statement evidences an intent to separate dinnerware having a unit value of over $7 per 77-Piece norm from that valued under $7 per norm by the Tariff Commission, and the norms were in different categories for the purpose of compilation of statistical and trade data.

It is not difficult to determine that dinnerware worth between $7 and $12 per set would be marketed and sold differently than dinnerware worth more than $12 per set, with different expectations on the part of the purchasers with respect to quality, performance, durability and desirability. Indeed, the marketing and sale of the different categories would be directed to different classes of purchasers.

This court does not decide that the involved merchandise is "of different categories" because it is encompassed in different items of the TSUS, as argued by plaintiff in its brief. None of the authorities relied on by the plaintiff supports such a conclusion. *International Seaway Trading Corp.* v. *United States*, 81 Cust. Ct. 92, C.D. 4773, 464 F. Supp. 380 (1978) involved rubber footwear with soles of material other than leather, with uppers of vegetable fibers. In considering whether the presumption of correctness attached to alternative categories of rubber and plastics within the same item number, the court concluded that the presumption attached to neither, and discussed the possibility that merchandise may fall within the same paragraph or item number. In the instant case, the issue is not whether the merchandise is encompassed in different categories within one item number, but whether it is encompassed in different items. The cited case is inapposite.

Webcor Electronics v. *United States*, 79 Cust. Ct. 137, C.D. 4725 (1977), relied on by defendant, involved dual protests of Customs' classification of merchandise described in the invoices as 8-track stereo tape players under item no. 685.30, TSUS and the assessment of a 10 percent surcharge under item 948.00, TSUS, on the identical merchandise. Identical merchandise is not involved in the instant case.

In *Russ Togs, Inc.* v. *United States*, 79 Cust. Ct. 119, C.D. 4722 (1977), the dual protests involved the issues of appraisement and classification of merchandise (jackets) not contended by the plaintiff to be of different categories.

It is the judgment of this court that the merchandise in issue, dinnerware of fine-grained earthenware or of fine-grained stoneware available

in specified sets having an aggregate value of over $7 but not over $12 is "of different categories" than dinnerware of the same composition but having an aggregate value of more than $12 per specified set, that the prohibition against dual protests contained in 19 U.S.C. § 1514 is inapplicable in this case, and that jurisdiction is properly vested in this court.

Accordingly, judgment is granted in favor of plaintiff based on the facts previously stipulated to by the parties.

Decisions of the United States Court of International Trade

Abstracts

Abstracted Protest Decisions

DEPARTMENT OF THE TREASURY, *July 27, 1981.*

The following abstracts of decisions of the United States Court of International Trade at New York are published for the information and guidance of officers of the customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary herein given will be of assistance to customs officials in easily locating cases and tracing important facts.

WILLIAM T. ARCHEY,
Acting Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P81/124	Richardson, J. July 20, 1981	Mattel, Inc.	75-5-01347	Item 737.90 or 737.15 17.5% Item 774.60 8.5% Without allowance under item 807.00	Items 807.00 and 737.90 or 737.15 17.5% Item 807.00/774.60 8.5% With cost or value of U.S. fabricated components deducted from full appraised value of imported articles into which they were assembled	Mattel, Inc. v. U.S. (C.A.D. 1248)	Los Angeles American goods returned; U.S. fabricated components invoiced as rubber bands, etc., assembled abroad into articles
P81/125	Richardson, J. July 20, 1981	F. W. Myers & Co., Inc.	72-8-01761-81	Item 608.05 0.3¢ per lb.	Item 608.02 12¢ per ton for merchandise entered in 1971; duty-free for subsequently entered merchandise	F. W. Myers & Co., Inc. v. U.S. (C.D. 4635)	Detroit Sponge iron powders

Decisions of the United States Court of International Trade

Abstracts

Abstracted Reappraisement Decisions

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R81/270	Re, C.J. July 20, 1981	Audiovox Corp.	73-1-00050, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Miscellaneous articles
R81/271	Re, C.J. July 20, 1981	Franklin Stores Corp.	73-5-01312	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Miscellaneous articles

R81/272	Re, C.J. July 20, 1981	Marco Pol Imports Ltd.	74-1-00245, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Miscellaneous articles
R81/273	Re, C.J. July 20, 1981	Nichimen Co., Inc.	75-11-02940, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Miscellaneous articles
R81/274	Landis, J. July 20, 1981	Mitsubishi International Corporation	74-3-00707, etc.	American selling price	Appraised values less 23%, per pair	Agreed statement of facts	Los Angeles Footwear
R81/275	Landis, J. July 20, 1981	Mitsubishi International Corporation	74-6-01433, etc.	American selling price	Appraised values less 23%, per pair	Agreed statement of facts	Los Angeles Footwear

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International Trade Commission Notices

Investigations by the U.S. International Trade Commission

DEPARTMENT OF THE TREASURY, *August 6, 1981.*

The appended notices relating to investigations by the U.S. International Trade Commission are published for the information of Customs officers and others concerned.

WILLIAM T. ARCHEY,
Acting Commissioner of Customs.

In the Matter of
CERTAIN MODULAR PUSHBUTTON SWITCHES AND COMPONENTS THEREOF
} Investigation No. 337-TA-96

Notice to All Parties

Notice is hereby given that the prehearing conference and hearing in this case scheduled to commence on August 3, 1981 (46 Fed. Reg. 35394) are cancelled.

The Secretary shall publish this Notice in the Federal Register.

Issued: July 24, 1981.

JANET D. SAXON,
Administrative Law Judge.

In the Matter of
CERTAIN MODULAR PUSHBUTTON SWITCHES AND COMPONENTS THEREOF
} Investigation No. 337-TA-96

Notice of Addition of International Telephone and Telegraph Company As a Party

AGENCY: U.S. International Trade Commission.

ACTION: Addition of a party.

SUMMARY: Upon consideration of Motion Docket 96–3, as certified to the Commission by the Administrative Law Judge (ALJ) on June 9, 1981 and the ALJ's recommendation that the motion be granted, the Commission has ordered that said motion is granted and that International Telephone and Telegraph Company is added as a party.

Copies of the Commission action and order are available to the public during official business hours (8:45 a.m. to 5:15 p.m.) at the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, telephone 202–523–0161.

FOR FURTHER INFORMATION CONTACT: Scott Daniels, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202–523–0480.

Issued: July 28, 1981.

By order of the Commission.

KENNETH R. MASON,
Secretary

Notice of Investigation and Hearing

(TA–201–45)

FISHING RODS AND PARTS THEREOF

AGENCY: United States International Trade Commission.

ACTION: Following receipt of a petition on July 13, 1981, filed by nineteen U.S. manufacturers of fishing rods and parts thereof, the U.S. International Trade Commission on July 27, 1981, instituted an investigation (No. TA–201–45) under section 201(b) of the Trade Act of 1974 (19 U.S.C. 2251(b)) to determine whether fishing rods and parts thereof, provided for in item 731.15 of the Tariff Schedules of the United States, are being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article.

EFFECTIVE DATE: July 13, 1981.

FOR FURTHER INFORMATION CONTACT: John MacHatton, Supervisory Investigator, U.S. International Trade Commission, Washington, D.C. 20436 (202–523–0439).

SUPPLEMENTARY INFORMATION:

Public hearing ordered. A public hearing in connection with this investigation will be held in Washington, D.C., at 10 a.m. e.d.t. on

Friday, October 2, 1981, in the Hearing Room, U.S. International Trade Commission Building, 701 E Street, NW. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission at his office in Washington no later than the close of business Wednesday, September 23, 1981.

Prehearing procedures. To facilitate the hearing process, it is requested that persons wishing to appear at the hearing submit prehearing briefs enumerating and discussing the issues which they wish to raise at the hearing. An original and nineteen copies of such prehearing briefs should be submitted to the Secretary no later than the close of business Wednesday, September 23, 1981. Copies of any prehearing briefs submitted will be made available for public inspection in the Office of the Secretary. While submission of prehearing briefs does not prohibit submission of prepared statements in accordance with section 201.12(d) of the Commission's Rules of Practice and Procedure (19 CFR 201.12(d)), it would be unnecessary to submit such a statement if a prehearing brief is submitted instead. Any prepared statements submitted will be made a part of the transcript. Oral presentations should, to the extent possible, be limited to issues raised in the prehearing briefs.

A prehearing conference will be held on Friday, September 25, 1981, at 10 a.m. e.d.t. in Room 117 of the U.S. International Trade Commission Building.

Persons not represented by counsel or public officials who have relevant matters to present may give testimony without regard to the suggested prehearing procedures outlined above.

Other written submissions. Other written submissions, except for posthearing briefs, should be filed with the Secretary to the Commission prior to the public hearing. Commercial or financial data which are confidential should be clearly marked "Confidential Business Information" and should be submitted in accord with the requirements of section 201.6 of the Commission's Rules of Practice and Procedure (19 CRF 201.6). Submissions should also conform to the general requirements of section 201.8 of the Commission's rules (19 CFR 201.8).

Inspection of petition. The petition filed in this case is available for public inspection at the Office of the Secretary, U.S. International Trade Commission.

Issued: July 28, 1981.

By order of the Commission.

KENNETH R. MASON,
Secretary.

In the Matter of CERTAIN MASS FLOW DEVICES AND COMPONENTS THEREOF	Investigation No. 337–TA–91

Notice of Commission Request for Comments Concerning Settlement Agreement

AGENCY: U.S. International Trade Commission.

ACTION: Request for public comments on proposed termination of this investigation based on settlement agreement.

SUMMARY: On June 10, 1981, all parties to *Certain Mass Flow Devices and Components Thereof*, investigation No. 337–TA–91, filed a joint motion to terminate the investigation, based on a settlement agreement entered into on June 1, 1981, by complainant Tylan Corporation of Torrance, CA ("Tylan") and respondents Advanced Semiconductor Holding b.v. of the Netherlands and Advanced Semiconductor Materials America, Inc. of Phoenix, AZ (collectively referred to herein as "ASM"). This motion, if granted, would have the effect of terminating this investigation. This notice contains a nonconfidential synopsis of the agreement and seeks public comments upon it.

DATES: Comments will be considered if received within thirty (30) days of the date this notice appears in the Federal Register. Comments should conform with Commission Rule 201.8 (19 CFR § 201.8) and should be addressed to Kenneth R. Mason, Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436.

FOR FURTHER INFORMATION CONTACT: Jane Albrecht, Esq., Office of the General Counsel, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436; telephone 202–523–1627.

SUPPLEMENTARY INFORMATION: This investigation was instituted upon publication by the Commission of notice in the Federal Register on November 26, 1980 (45 F.R. 78843).

SYNOPSIS OF THE SETTLEMENT AGREEMENT

The settlement agreement in question settles all outstanding litigation involving Tylan and ASM before this and all other forums.

Tylan agrees for a specified sum of money to grant ASM a fully paid-up, royalty-free, non-exclusive, nontransferable and unassignable license for the practice of U.S. Letters Patent Nos. 3,650,505, 3,851,-526, and 3,938,384, and their foreign counterparts (other than Tylan's Japanese patents and Japanese patent application). Similarly, for a

specified sum of money, Nippon Tylan agrees to deliver to ASM to a fully paid-up, royalty-free, non-exclusive, nontransferable and unassignable license to Japanese Patents Nos. 861655 and 970462 and Japanese Patent Application No. 114381/73 for the importation into or manufacture in Japan of devices to be sold only after such devices have been incorporated as components of systems or as spare or replacement parts in such systems.

ASM agrees not to contest or oppose in any manner the validity or enforceability of all of the above-mentioned patents. Additionally, Tylan agrees to sell to ASM and ASM agrees to accept delivery from Tylan of an agreed-upon number of units of Tylan's mass flow controllers within the next three years.

COMMENTS REQUESTED: In light of the Commission's duty to consider the public interest in this investigation, the Commission requests written comments from interested persons concerning the effect of the termination of this investigation based upon the settlement agreement upon (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) the production of like or directly competitive articles in the United States, and (4) U.S. consumers. Written comments must be filed with the Secretary to the Commission no later than 30 days after publication of this notice in the Federal Register. The Commission will consider requests for oral argument or oral presentation on this matter if such requests are received in the Office of the Secretary not later than 15 days after publication of this notice in the Federal Register. Any peron desiring to submit a document (or portion thereof) to the Commission in confidence must request *in camera* treatment. Such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. The Commission will either accept such submission in confidence or return it. All nonconfidential written submissions will be open for public inspection at the Secretary's office.

Issued: July 29, 1981.

By order of the Commission.

KENNETH R. MASON,
Secretary.

In the Matter of
CERTAIN MOLDED-IN SANDWICH PANEL INSERTS AND METHODS FOR THEIR INSTALLATION } Investigation No. 337–TA–99

Notice of Addition of Two Respondents

AGENCY: U.S. International Trade Commission.

ACTION: Addition of two parties respondent.

AUTHORITY: The authority for the Commission action in this matter is contained in section 337 of the Tariff Act of 1930, 19 § U.S.C. 1337, and 19 CFR § 210.22

SUMMARY: Notice is hereby given that the Commission has granted the motion of complainant to amend the complaint and notice of investigation to add Kyoei Trading Corp. (Kyoei), of Osaka, Japan, and Hariki Metal Industries (Hariki), also of Osaka, Japan, as respondents in the subject investigation.

SUPPLEMENTARY INFORMATION: On April 29, 1981, the Commission, upon receipt of complaint filed by Shur-Lok Corp., of Los Angeles, California, published in the Federal Register (46 F.R. 24034); Wed., Apr. 29, 1981, notice of an investigation to determine whether there is a violation of section 337(a) of the Tariff Act of 1930 in the importation into the United States of certain molded-in sandwich panel inserts, or in their sale, by reason of (1) the alleged infringement by said molded-in sandwich panel inserts of the sole claim of U.S. Letters Patent 3,182,015, (2) the alleged infringement of claims 1–4 of U.S. Letters Patent 3,271,498 and all four claims of U.S. Letters Patent 3,392,225 and the inducement of and/or contribution to said infringement, and (3) the alleged misappropriation of complainant's trade secrets. The complaint alleges that the effect or tendency of the aforementioned unfair methods of competition and unfair acts is to destroy or substantially injure an industry, efficiently and economically operated, in the United States.

On June 15, 1981, complainant filed a motion to amend the complaint and notice of investigation to add Kyoei and Hariki as parties respondents. The administrative law judge certified the motion to the Commission and recommended that it be granted. There was no opposition to the proposed amendments.

Any party wishing reconsideration of the Commission's action must do so within fourteen (14) days of service of the Commission order. Any such petition must be in accord with the Commission's Rules of Practice and Procedure (19 CFR § 210.56).

Copies of the Commission's Action and Order and any other public documents in this investigation are available for inspection during official working hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, United States International Trade Commission, 701 E Street NW., Washington, D.C. 20436, telephone 202–523–0161.

Notice of the institution of this investigation was published in the Federal Register of April 29, 1981 (46 F.R. 24034)

FOR FURTHER INFORMATION CONTACT: Clarease E. Mitchell, Esq., Office of the General Counsel, telephone 202–523–0148

Issued: August 3, 1981.

By order of the Commission.

KENNETH R. MASON,
Secretary.

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U.S. Customs Service

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